APPENDIX A

STATE of Missouri, Respondent

v.

James William STIDHAM, Appellant.

No. 45537

Supreme Court of Missouri,
Division No. 2.
Sept. 9, 1957.

Prosecution resulting in conviction of first degree murder arising out of a prison riot and based on a theory of conspiracy. The Circuit Court of Butler County, Randolph Weber, J., entered judgment of conviction and defendant appealed. The Supreme Court, Bohling, C., held that instruction concerning conspiracy using the words, "aid, abet, assist or encourage" in the disjunctive rather than conjunctively, was proper and did not erroneously authorize a conviction upon a finding that defendant did any one of the four acts.

Judgment affirmed.

1. Criminal Law (Key) 736(2)

In prosecution resulting in a conviction of first degree murder, question concerning the voluntariness of defendant's confession was for jury.

2. Homicide (Key) 308(3), 309(5)

In prosecution resulting in conviction of first degree murder, under defense of alibi the only submissible issue of guilt under evidence was murder in first degree, and therefore the trial court did not err in failing to instruct on murder in the second degree and manslaughter. Section 559.010 RSMo 1949, V.A.M.S.

3. Criminal Law (Key) 437

In prosecution resulting in conviction of first degree murder arising out of prison riot, diagram of floor plan of prison basement, which showed location of cells, steel gates and which was drawn to scale and which was identified by the person making it as well as others was admissible. Section 559.010 RSMo 1949, V.A.M.S.

4. Criminal Law (Key) 404(4)

In prosecution resulting in conviction of first degree murder arising out of a prison riot, 16-pound sledge hammer found at side of victim's body the night of riot was admissible. Section 559.010 RSMo 1949, V.A.M.S.

5. Criminal Law (Key) 1169(5)

In prosecution resulting in conviction of first degree murder arising out of a prison riot, court's instruction to witness not to testify to any statements made by others and conveyed to defendant by the witness cured any alleged error of police officer attempting to explain to defendant that officer had a statement from others.

6. Criminal Law (Key) 432

In prosecution resulting in conviction of first degree murder, trial court properly refused exhibits allegedly relating to fact that a witness was of unsound mind and incompetent since the sources of information and the method and time of preparation of exhibits were not such as to justify exhibits' admission. Sections 490.680, 559.010 RSMo 1949, V.A.M.S.

7. Witnesses (Key) 79(3)

It is court's function, not the function of jury, to pass on competency of a witness. Section 491.060 RSMo 1949, V.A.M.S.

8. Witnesses (Key) 330(3)

Trial courts may exercise a sound discretion as to the extent of the examination of witnesses with respect to specific acts on collateral matters affecting their credibility and not directly connected with the issues on trial.

9. Criminal Law (Key) 1136

Where defendant's counsel did not avail himself of court's offer to recall witness, defendant could not assert error in that he had been unable to cross-examine a witness completely in respect desired.

10. Homicide (Key) 308(1)

In prosecution resulting in conviction of first degree murder, instruction properly required jury to find that the conspirators willfully killed victim.

11. Criminal Law (Key) 755½, 761(11), 811(3)

Where defense to murder prosecution was alibi and there was no contention or evidence that the victim had not been murdered, use of the words "kill and murder" and "killing and murdering" and their repetition several times in an instruction did not constitute comment on evidence or single out and give undue prominence to such words and did not assume a murder had been committed.

12. Homicide (Key) 305

In prosecution resulting in conviction of defendant of murder in the first degree based on theory defendant had conspired with others to kill victim during prison riot, under statute that principals in second degree in the commission of any felony or accessories to any murder or other felony before the fact may be charged, tried, convicted and punished in same manner, as the principal in the first de-

gree, use of words "aid, abet, assist or encourage" in instruction concerning conspiracy disjunctively rather than conjunctively did not erroneously authorize conviction upon the finding that defendant did any one of the four acts. Sections 556.120, 556.170, 559.010 RSMo 1949, V.A.M.S.

13. Criminal Law (Key) 64

With respect to convictions of principals in second degree, in absence of statutory provisions, no particular acts are necessary, nor is it necessary that any physical part in the commission of the crime be taken; mere encouragement is enough.

14. Conspiracy (Key) 41

Persons entering a conspiracy after its formation are deemed in law parties to all acts done by any one of the conspirators, before or after persons' entrance, in furtherance of the conspiracy.

15. Homicide (Key) 234(1)

Evidence justified finding that a conspiracy had been committed and finding of the actual participation in and consummation of the conspiracy to murder by defendant and others named in indictment. Section 559.010 RSMo 1949, V.A.M.S.

16. Criminal Law (Key) 822(1)

An instruction is to be considered as a whole and with other instructions in the case.

17. Conspiracy (Key) 41

Criminal Law (Key) 64, 69

Act of one of conspirators in the furtherance of a conspiracy is the act of the other conspirators and principals

in the second degree and accessories before the fact are equally guilty with the principal in first degree. Section 556.170 RSMo 1949, V.A.M.S.

18. Criminal Law (Key) 763(19), 781(5)

In prosecution resulting in conviction of first degree murder, instruction regarding voluntariness of defendant's confession was proper and statement in instruction to the effect that if jury did not believe that a statement, written or oral and claimed to be a confession made by the defendant, was voluntarily made by him, jury should disregard the statement, was not ambiguous, misleading, incomplete or a comment on evidence. Section 559.010 RSMo 1949, V.A.M.S.

19. Criminal Law (Key) 805(3)

In prosecution resulting in conviction of first degree murder, instruction to effect that if jury believed defendant's statement, written or oral, was voluntarily made, jury must consider such statement did not mislead jury although more appropriately the word "may" could have been used rather than the word "must".

20. Criminal Law (Key) 388

Results of a lie detector examination are inadmissible in evidence.

21. Criminal Law (Key) 900

The statutory right of an accused to no reference to his failure to testify may be waived by him. Section 546.270 RSMo 1949, V.A.M.S.; 42 V.A.M.S. Supreme Court Rules, rules 26.08, 28.02, 28.08.

22. Criminal Law (Key) 721(2)

When an accused takes the stand in his defense, his failure to testify on specific facts involved in the case is a legitimate subject of comment by the state in argument.

23. Criminal Law (Key) 721(2)

Where defendant, accused of murder in first degree, had taken the stand, defendant's failure to deny incriminating facts was open to comment whether the denial should have occurred in an appearance in chief or in an appearance in surrebuttal. Section 546.270 RSMo 1949, V.A.M.S.; 42 V.A.M.S. Supreme Court Rules, rules 26.08, 28.02, 28.08.

Mark H. Hennelly, St. Louis, for appellant.

John M. Dalton, Atty. Gen., Winston Cook, Sp. Asst. Atty. Gen., for respondent.

BOHLING, Commissioner.

James William Stidham appeals from a sentence of life imprisonment for the first degree murder of Walter Lee Donnell during the riot at the Missouri Penitentiary on the evening of September 22, 1954, in Cole County, Missouri. § 559.010. (Statutory references are to RSMo 1949 and V.A.M.S.) The indictment charged defendant, William R. Hoover, Jackie Lee Noble, Paul Edward Kenton, Rollie Laster, Don Wm. DeLapp and Joseph M. Vidauri with the commission of the offense. All were inmates of the penitentiary. Defendant's case, upon his application for change of venue, was tried in the Circuit Court of Butler County, Missouri, in July, 1955. Defendant was well represented by counsel. He has filed no brief. His motion for new trial presents many issues.

The defense was an alibi; but certain issues call for some detail of the facts.

[1] I. There is no merit in defendant's contention that his written confession was coerced and involuntary and was admitted in evidence before the State established that it had been voluntarily given. The court conducted a full preliminary hearing on the issue, found the issue was for the jury, and later, after hearing the evidence before the jury, submitted the issue to the jury for determination. The testimony was to like effect at each hearing. Two members of the State Highway Patrol and four members of the St. Louis Metropolitan Police force, present at the time defendant claimed physical violence occurred, testified that no promises had been given, or physical violence, duress, threats or abuse was offered to defendant, categorically denying defendant's testimony. On the conflicting showing the issue of the voluntariness of the confession was for the jury. State v. Gibilterra, 342 Mo. 577, 116 S.W. 2d 88, 93 [3, 4]; State v. Laster, Mo., 293 S.W.2d 300, 303 [1, 2]; State v. Sanford, 354 Mo. 998, 1006 [4], 193 S.W.2d 31, 37, 38 [2]; State v. Menz, 341 Mo. 74, 106 S.W.2d 440, 448 [12].

Defendant stated, among other things, in his confession, written in his own hand, that several prisoners broke into death row and Paul Kenton unlocked his cell door. He and several other prisoners then went to Creighton's cell to attack him but he had his lock blocked and they could not enter. They then entered Donnell's cell, and, quoting: "Kenton held Donnell while Laster stabbed him several times with an ice pick, at the same time I slashed at him three or four times around the face and neck with a knife that Kenton gave me when he opened the door. When Donnell fell to the floor Linder and Thompson each said get Donnell with the sledge and they proceeded to

hit him with a sledge hammer and a crowbar." Defendant also orally stated that he did not like Donnell because Donnell had snitched in regard to a riot in July and caused defendant to be punished; that Donnell had snitched on some of the boys and they had received a lot of time; and that he was living his life under a different code than the officers.

The jury could find, aside from defendant's confession, the following outlined facts from the evidence.

The homicide occurred in what is known as "death row." Death row, consisting of thirty-two cells, was located in the basement of "B" Hall. Three heavy steel gates or doors separated death row proper from other parts of the building. B Hall proper, above death row, housed a cell block.

The riot started about 6:30 p. m. September 22, 1954. Nine inmates, for various reasons were confined in death row that evening. Defendant, who was known as "Slick," and his co-indictee Laster occupied adjoining cells, having been transferred to death row about July, 1954. Donnell, the deceased, and James M. Creighton also occupied adjoining cells in death row, some distance from defendant and Laster.

From the date defendant was placed in death row he would "holler down" and curse and ridicule Donnell, threatened to kill Donnell if he ever got to him, said that "when they come in here and get us out, we are going down there and kill" Donnell and Creighton; and that they should have killed Donnell over in E Hall when they broke out over there.

Clarence Dietzel was on guard duty in death row the night of the riot. He noticed the disturbance and started closing the windows to death row. Defendant and Laster

demanded that the windows opposite their cells be left open.

About 7:00 or 7:30 p. m. some of the rioters tried to break into B Basement. While the prisoners were trying to break into death row, defendant and Laster "hollered" that they would be down to kill Donnell and Creighton as soon as they got out of their cells. Defendant said he was going to kill Donnell because Donnell took the stand against one Thompson and some others.

DeLapp, known as Curley, Kenton, Noble, Hoover, and Vidauri, were among the number trying to break in. They worked on the first door with a sledge hammer, crowbars, pick and other small tools. DeLapp called to defendant, saying: "Slick, this is Curley DeLapp. We will be in to get you out if it takes, costs us hell and high water." "We are coming down to get you out. We are going to get you out." Defendant answered: "Hurry up, Goddamn it, I am waiting for you." DeLapp sent Hoover and Kenton out to burn the buildings. They returned. Vidauri guarded a paint bucket containing knives, having 5 or 6 inch blades, used in the twine plant. After working on the door for a while, DeLapp called to defendant that they could not make it and were going to try something else. Defendant told DeLapp to come around to the south windows and said he might make it there. DeLapp, Noble, Hoover and Kenton went out and tried to make an entrance through the wall into death row with the sledge hammer. Defendant and Laster talked to DeLapp through the open windows and had him go back and work on the door. They again started to work on the door and DeLapp called to defendant saying: "We are going to try again." Then, in a short time someone produced a key and the men came into B Basement proper. DeLapp and also Kenton demanded Dietzel's keys, threatening to kill him if he refused to hand

them over. Dietzel insisted he did not have the keys and did not give the keys to them. DeLapp with the help of others, then broke the lock on the second door with a sledge hammer. DeLapp, Noble, Kenton and Hoover immediately entered to where guard Dietzel was. They placed Dietzel on a small table and searched him for the keys, Kenton pulling the lining completely out of his coat. DeLapp ordered Dietzel to call the warden's office and immediately took the telephone from him. About this time the door to death row proper opened. Noble and Kenton placed Dietzel in one of the death row cells, where he remained for about twenty minutes, and was then taken up the steps and placed in the mop room in B Hall.

DeLapp, Noble, Kenton, Hoover, Vidauri and one Miller finally released defendant and Laster, as well as other prisoners who desired to be released from their cells in death row. DeLapp led them up the aisle and said to the onlookers: "Get back men, they are coming out now"; and when they came out and stopped, DeLapp put his arm around defendant's shoulders and said: "Gentlemen, I have brought you this far, this is your leader from here on." Defendant answered: "Well men, I am ready to work." They then went into the room where Vidauri was guarding the knives and returned to death row armed with weapons. Defendant told Vidauri to go ahead but Vidauri answered, "No, I am going with you. I am all the way with you guys." They then went back into death row. DeLapp had the other inmates go upstairs in B Hall.

Defendant, Laster, Hoover, DeLapp, Kenton, Noble and Vidauri tried to break into Creighton's cell. They had a sledge hammer, a pole and other weapons. Creighton had jammed his lock with concrete and a comb. Defendant said he was going to settle the score with Donnell and

Creighton. They broke Creighton's jaw in two places, using a pole. He got the pole away from them, and started using it on them. Defendant told Donnell they would be over to get him next. They could not get Creighton's cell door open and started working on Donnell's door. Creighton heard Donnell's door go back and saw the seven men walk up to go into Donnell's cell. He could not see through the cell walls. He heard Donnell hollering: "I ain't no rat, I ain't no snitch. And I ain't never harmed you boys," and he was begging them. Pretty soon Donnell was going Oh, oh, and he hollered real loud and got to kind of gurgling. The men then ran out of Donnell's cell and up the aisle. They went to a wash basin and each washed his hands. Defendant and Noble took off their undershirts and discarded them.

Donnell received a multiplicity of wounds. He had five stab wounds in the front and four stab wounds in the back on the left side in the region of the heart and lungs. Two of the front wounds passed completely through his heart and two of the back wounds penetrated his heart. His skull had sustained an egg shell type fracture, three or four inches in area, a multiple crushing type fracture of many small fragments, which could have been made by a bloody, 16-pound sledge hammer found alongside his body about 10:30 p. m. that day by an officer. He had other wounds on his body.

[2] II. Defendant contends error resulted from the court's failure to instruct on murder in the second degree and manslaughter. The defense was an alibi. The only submissible issue of guilt under the evidence was murder in the first degree. State v. Taylor, 347 Mo. 607, 148 S.W. 2d 802, 805 [5]; State v. Clymer, Mo., 159 S.W.2d 808, 812 [9]; State v. Barbata, 336 Mo. 362, 80 S.W.2d 865, 868 [1, 2]. See State v. Laster, Mo., 293 S.W.2d 300, 302, and §

559.010. It also follows that error was not committed in overruling defendant's motions for judgment of acquittal and judgment of acquittal as to murder in the first degree.

[3,4] III. Defendant's contentions that State's Exhibits No. 1 and No. 9 should not have been received in evidence because hearsay, not properly identified and because such action violated his constitutional rights are without merit. The testimony established that Exhibit 1 was a diagram of the floor plan of B Basement, showed the location of the cells, steel gates, et cetera, was drawn to scale, and it was identified by the person making it and others. State's Exhibit 1 was admissible. State v. McGee, 336 Mo. 1082, 83 S.W.2d 98, 107 [26]; State v. McHarness, Mo., 255 S.W.2d 826, 829 [6]. Exhibit 9 was a bloody 16-pound sledge hammer found at the side of Donnell's body by W. S. Barton of the State Highway Patrol about 10:30 p. m. the night of the riot. It was also identified by a number of other witnesses. Defendant's confession refers to the use of a sledge hammer in the killing of Donnell. There was no error in the admission of Exhibit 9. State v. Hopkins, 278 Mo. 388, 213 S.W. 126, 128 [5]; State v. Wilson, 223 Mo. 173, 189, 122 S.W. 671, 676 [5].

[5] IV. During the examination of Officer Eitzman of St. Louis, who was present at the time defendant gave his written confession, the officer stated he talked to defendant "and explained to him that I had a statement * * *." Defendant's objection to the remark was sustained and the witness was instructed not to testify to any statements made by other prisoners and conveyed to defendant by the witness. Notwithstanding the court's ruling, defendant's motion for new trial asserts the court could not cure the alleged error. A more questionable situation arose under similar circumstances in State v. Vidauri, Mo., 293 S.W.2d 955, 956 [2,3], and was ruled against defend-

ant's contention. See State v. Montgomery, Mo., 223 S.W. 2d 463, 466 [11,12]. The point is ruled against defendant.

[6,7] V. Defendant claims error in the exclusion of his Exhibits B, C, C-1, and D. Exhibit B was never offered in evidence.

Defendant objected to James M. Creighton being sworn as a witness on the ground he was of unsound mind and incompetent. The jury was excused and a voir dire hearing was conducted at which Mrs. Alma Miller, the Medical Records Clerk of State Hospital No. 1, at Fulton, and Creighton were examined. Mrs. Miller produced a file of a number of pages marked defendant's Exhibit B for identification, and out of the file defendant offered and the court accepted in evidence at the voir dire examination two typewritten sheets marked defendant's Exhibits C and C-1; and another typewritten sheet marked defendant's Exhibit D.

Creighton testified on voir dire that he had been in "solitary" for about eighteen months and "played crazy," put on a good act to get out of solitary and be sent to the State Hospital and after thirty-five days was returned to the Penitentiary; that he had never been before a Probate Court and committed as an insane person; and that he had been in a mental institution only that one time. The court found that Creighton was a competent witness.

Later, upon Creighton's cross-examination before the jury defendant developed that Creighton had put on a pretty good act and had been transferred to the State Hospital at Fulton, where he remained five or six weeks before being retransferred to the Penitentiary, and placed in death row in May, 1954. Upon an objection being interposed to a question, counsel for defendant, out of the presence of the jury, stated he was asking the court to

make Creighton's competency as a witness a jury question. The court informed counsel the jury passed on the credibility of witnesses but not their competency and counsel was entitled to examine the witness on any matters affecting his credibility. Counsel stated he would not pursue the matter further. His subsequent offer of said Exhibits C, C-1, and D in evidence before the jury was refused.

Mrs. Miller testified that Exhibits C and C-1 were attached to a Missouri Penitentiary letterhead; that she did not know who made the record or when it was made, and could not say it was a record of State Hospital No. 1; and with respect to Exhibit D she was not willing to swear it was correct because it was not signed. The showing was such as to permit of a finding that the sources of information, and method and time of preparation of the exhibits were not such as to justify their admission before the jury. § 490.680; Gray v. St. Louis-San Francisco R. Co., 363 Mo. 864, 254 S.W.2d 577, 579 [1]. In addition, it was the court's function, and not the function of the jury, to pass on the competency of the witness. § 491.060; State v. Whitsett, 232 Mo. 511, 526(IV), 134 S.W. 555, 560(4); Kleinschmidt v. Bell, 353 Mo. 516, 183 S.W.2d 87, 91 [4,5]; State v. Herring, 268 Mo. 514, 188 S.W. 169, 172 [3, 5-8]; 97 C.J.S. Witnesses § 119 f, p. 541; 2 Wigmore on Evidence 523, §§ 487, 497(c).

[8,9] VI. The court sustained an objection to defendant's offer of proof at the close of the cross-examination of witness Creighton that he had access to one Mary Annis, they both being confined in the Cole County jail at the time of trial. Thereafter and prior to the calling of the next witness the court made it clear to defendant's counsel that he was at liberty to show the interest of the witness in testifying in the case and to develop any arrangement made covering any special privileges in connection with

his testimony, and offered to recall the witness for further cross-examination. Defendant's motion for new trial states the court erred in not permitting him to cross-examine the witness completely with respect to his association with Mary Annis. Trial courts may exercise a sound discretion as to the extent of the examination of witnesses with respect to specific acts on collateral matters affecting their credibility and not directly connected with the issues on trial. Adriance v. Arnot, 31 Mo. 471; State v. Nasello, 325 Mo. 442, 30 S.W.2d 132, 139 [26]; State v. Brotherton, Mo., 266 S.W.2d 712, 714 [2]. Counsel did not avail himself of the court's offer to recall the witness and may not now successfully urge reversible error.

VII. Defendant makes many attacks on the State's main instruction, Instruction No. 4, which, after defining "felonious," and other terms, reads, in so far as questioned:

"Bearing in mind these definitions and those included in the other instructions, the court instructs the jury that if you believe and find from the evidence, beyond a reasonable doubt, that Rollie Laster, William R. Hoover, Paul Edward Kenton, Jackie Lee Noble, Don William DeLapp, and Joseph M. Vidauri entered into a conspiracy and agreement to act in concert and together to kill and murder Walter Lee Donnell at the time and place and in the manner and by the means hereafter set forth in this instruction, and if you believe and find from the evidence, beyond a reasonable doubt, that pursuant to such a conspiracy and agreement those aforesaid persons, acting in concert and together, on September 22, 1954, in Cole County, Missouri, wilfully, deliberately, premeditatedly, and with malice aforethought did make an assault upon Walter Lee Donnell, and then and there did wilfully, deliberately, premeditatedly, and with malice aforethought forcibly strike, hit,

stab, cut, and beat Walter Lee Donnell in and upon his face, head, and body, with a sledge hammer, and a knife, and another sharp instrument or dagger, if you so find, thereby giving Walter Lee Donnell about his face, head, and body, mortal wounds from the effects of which he died on September 22, 1954, if you so find, and if you further believe and find from the evidence, and beyond a reasonable doubt, that the defendant, James William Stidham, at the time of such killing and murdering, was a member of the conspiracy and agreement aforesaid and theretofore had conspired and agreed with Rollie Laster, William R. Hoover, Paul Edward Kenton, Jackie Lee Noble, Don William DeLapp, and Joseph M. Vidauri, to aid, abet, assist or encourage them in the killing and murdering of Walter Lee Donnell at the time and place and in the manner and by the means aforesaid, and if you further believe and find from the evidence, beyond a reasonable doubt, that the defendant, James William Stidham, pursuant to such conspiracy and agreement, was actually present during the killing and murdering aforesaid of Walter Lee Donnell, and that he knew of the felonious purpose and intent of Rollie Laster, William R. Hoover, Paul Edward Kenton, Jackie Lee Noble, Don William DeLapp, and Joseph Vidauri to kill and murder Walter Lee Donnell as aforesaid, and that James William Stidham then and there knowingly and intentionally aided, abetted, assisted, or encouraged the aforesaid persons, or any of them, in the aforesaid killing and murdering, then you should find the defendant, James William Stidham, guilty of Murder in the First Degree and by your verdict so say. * * *"

[10] a. The required finding of the instruction that pursuant to a conspiracy the conspirators acting in concert "then and there did wilfully, deliberately, premeditatedly, and with malice aforethought forcibly strike, hit, stab, cut,

and beat Walter Lee Donnell in and upon his face, head, and body, with a sledge hammer, and a knife, and another sharp instrument or dagger, if you so find, thereby giving Walter Lee Donnell about his face, head and body, mortal wounds from the effects of which he died on September 22, 1954, if you so find," refutes defendant's assertion that the instruction did not require the jury to find that the conspirators wilfully, et cetera, killed Donnell.

[11] b. The use of the words "kill and murder" and "killing and murdering" and their repetition several times in the instruction did not, as stated by defendant, constitute a comment on the evidence, or single out and give undue prominence to such words, under the facts adduced in evidence by the State and did not assume a murder had been committed. The instruction required the finding of the submitted facts beyond a reasonable doubt. The defense was an alibi; and there was no contention or evidence that Donnell had not been murdered.

[12, 13] c. Defendant questions the use of the words "aid, abet, assist or encourage" and "aided, abetted, assisted, or encouraged" in the instruction, contending the use of the terms disjunctively rather than conjunctively erroneously authorized a conviction upon a finding that defendant did any one of the four acts. Under § 556.170 principals in the second degree in the commission of any felony or accessories to any murder or other felony before the fact "may be charged, tried, convicted and punished in the same manner, as the principal in the first degree." Consult also § 556.120 on the offense of conspiracy. Blackstone's Commentaries, Vol. 4, Ch. III, p. *34, defines a principal in the first degree as "the actor or absolute perpetrator of the crime; and in the second degree he is who is present, aiding and abetting the fact to be done"; and an accessory before the fact "to be one

who, being absent at the time of the crime committed, doth yet procure, counsel, or command another to commit a crime." See authorities there cited; also 22 C.J.S. Criminal Law §§ 85-93, p. 152; 14 Am.Jur. 820, B, 832, C. It is stated in 22 C.J.S. Criminal Law § 88, p. 159, with respect to principals in the second degree, in the absence of statutory provisions that "no particular acts are necessary; nor is it necessary that any physical part in the commission of the crime be taken; mere encouragement is enough." And see Id., § 93, p. 164, with respect to an accessory before the fact. McMannus v. Lee, 43 Mo. 206, 208, states: "The law is well laid down that any person who is present at the commission of a trespass, encouraging or exciting the same by words, gestures, looks, or signs, or who in any way or by any means countenances or approves the same, is in law deemed to be an aider and abettor, and liable as a principal * * *." Approved in State v. Walker, 98 Mo. 95, 104, 110(11), 9 S.W. 646, 650, 652(11), 11 S.W. 1133, and other cases. See also State v. Messino, 325 Mo. 743, 766(V), 30 S.W.2d 750, 760(V); State v. Lawrence, Mo., 280 S.W.2d 842, 848; State v. Ruffin, Mo., 286 S.W.2d 743, 748 [10, 11]; State v. Murray, Mo., 193 S.W. 830, 832; State v. Clymer, Mo., 159 S.W.2d 808, 811 [8]; People v. Chapman, 62 Mich. 280, 284, 28 N.W. 896, 897. The submission was not erroneous.

[14, 15] d. We have hereinbefore stated enough, but not all, of the evidence favorable to the State. Generally, a conspiracy is not shown by direct evidence. It is often inferred from the circumstances. State v. Parr, 296 Mo. 406, 246 S.W. 903, 906 [8]. In the instant case there was ample evidence for a finding of the conspiracy submitted and the actual participation in and consummation of the said conspiracy by the persons named in the instruction. Persons entering a conspiracy after its formation are

deemed in law parties to all acts done by any one of the conspirators, before or after his entrance, in furtherance of the conspiracy. State v. Walker, 98 Mo. 95, 105, 106, 9 S.W. 646, 650; State v. Crab, 121 Mo. 554, 563, 26 S.W. 548, 550; State v. Richetti, 342 Mo. 1015, 119 S.W.2d 330, 342 [14, 15]; 15 C.J.S. Conspiracy § 75, p. 1107; 11 Am.Jur. 571, § 40.

[16] An instruction is to be considered as a whole and with the other instructions in the case. Instruction No. 4 is to be read with No. 5, set out infra. The Missouri cases cited to Point VII, c. sustain Instruction No. 4. It was more favorable to defendant than the law required it to be. We need not detail the other attacks against it.

VIII. Defendant's motion questions Instruction No. 5, which reads:

"The Court instructs the jury that, if you believe and find from the evidence, beyond a reasonable doubt, that the defendant, James William Stidham, and William R. Hoover, Rollie Laster, Paul Edward Kenton, Jackie Lee Noble, Don William De Lapp and Joseph M. Vidauri entered into a conspiracy and agreement to act in concert and together to kill and murder Walter Lee Donnell at the time and place and in the manner and by the means set forth in Instruction No. 4, then the act of either of them pursuant to such conspiracy and agreement to kill and murder Walter Lee Donnell would be in law the act of each one so conspiring and agreeing.

"The word 'Conspiracy,' as used in these instructions, means a common agreement and understanding between two or more persons which is formed for the purpose of committing and doing by their joint efforts some criminal act.

"The Court instructs the jury that all persons are principals who are guilty of acting in concert and together in the commission of a crime. When a crime is actually committed by one or more persons and another person is actually present, and, knowing of the felonious purpose and intent of the person or persons committing the crime, he knowingly and intentionally aids, abets, assists or encourages the person or persons actually committing the crime in the commission of the same, then such person so knowingly and intentionally aiding, abetting, assisting or encouraging the person or persons actually committing the crime in the commission of the same is a principal and he is equally guilty with the person or persons who actually commits the crime.

"However, you are further instructed that the mere presence of a person at the time and place of the commission of a crime by another or others is not alone sufficient to justify him in any manner responsible for the commission of such crime. On the contrary, before such person can be found in any manner responsible for the commission of such crime, the evidence in the case must show, beyond a reasonable doubt, not only that such person was actually present at the commission of such crime, but also that such person knew of the felonious purpose and intent on the part of the person or persons actually committing the crime, and that he then and there was knowingly and intentionally aiding, abetting, assisting or encouraging the person or persons committing the crime in the commission of the same."

[17] This instruction is to be considered with the other instructions in the case. The submitted facts of the first paragraph of Instruction No. 5 were required to be found beyond a reasonable doubt. The other paragraphs of the instruction are merely definitive, legal statements of

what constitutes a conspirator and a conspiracy, assume nothing, and are not subject to successful attack on the ground they are abstract. We have hereinbefore held there was substantial evidence of the submitted conspiracy embracing all the named participants. The conspiracy was incidental to the offense charged. It is also the law that the act of one of the conspirators in the furtherance of the conspiracy is the act of the other conspirators, and § 556.170 makes principals in the second degree and accessories before the fact equally guilty with the principal in the first degree. (See instructions in State v. Cantlin, 118 Mo. 100, 107, 111(II), 23 S.W. 1091, 1093, 1095(2), considered to fairly cover the issue.) What we have hereinbefore said sufficiently answers defendant's attacks against Instruction No. 5. Instructions less favorable to a defendant have been approved. State v. Walker, supra; State v. Messino, supra; State v. Murray, supra; State v. Lawrence, supra; State v. Clymer, supra; State v. Nasello, 325 Mo. 442, 459(IV), 30 S.W.2d 132, 137(IV) (instruction 2 therein being to the same effect as instruction 2 set out in State v. Messino, supra); State v. Williams, 309 Mo. 155, 274 S.W. 427, 434(VII); State v. Dowling, 360 Mo. 746, 230 S.W.2d 691, 694 [6]; State v. Mayberry, Mo., 272 S.W.2d 236, 243 [20].

[18] IX. Defendant also questions Instruction No. 6, which reads:

"The Court instructs the jury that before any alleged statement can be valid, and before you can even consider it, it must have been made voluntarily, that is to say, without anyone having offered to the person who is claimed to have made such a statement any hope of leniency or reward of any kind for making such statement, and without anyone making any threat or doing any violence to the person claimed to have made any such statement in order to induce or force him to confess.

"If the jury does not believe that a statement, written or oral, and claimed to be a confession made by the defendant, was voluntarily made by him as defined above, the jury should entirely disregard such statement in arriving at your verdict.

"If, however, the jury does believe that a statement, written or oral, and claimed to be a confession made by the defendant, was voluntarily made by him as defined above, the jury must consider such statement and you should give it such weight as you believe it deserves in arriving at your verdict."

We do not agree with the contention in defendant's motion that the clause "claimed to be a confession made by the defendant" is ambiguous, misleading, incomplete and a comment on the evidence. The State's evidence was that the statements were voluntary and defendant's evidence was to the contrary. No intelligent jury would be confused. It was proper to instruct on the voluntariness of defendant's statement. State v. Cunningkin, Mo., 261 S.W.2d 85, 87.

[19] Defendant contends in his motion the use of the word "must" in the third paragraph of Instruction No. 6 gives judicial direction to the jury, invades the province of the jury and is a comment on the evidence. The instruction is a cautionary instruction on a collateral issue, does not direct a verdict, and is not on an issue the court is required to instruct upon as part of the law of the case under Sup.Ct. Rule 26.02, 42 V.A.M.S. § 546.070(4); State v. Cunningkin, Mo., supra; State v. Gibilterra, 342 Mo. 577, 116 S.W.2d 88, 94, 95; State v. Francies, Mo., 295 S.W.2d 8, 15 [24, 25]. Trial juries "shall be sworn well and truly to try the case." Sup.Ct.R. 26.02. See §§ 546.070, 546.220; State v. Duff, 253 Mo. 415, 424(IV), 161 S.W. 683, 685(IV). The oath administered to trial jurors embraces the obligation to try the case according to the evidence. Consult 50

C.J.S. Juries § 296, p. 1088; 2 Hale, Pleas of the Crown, 293. The instruction made it plain that before the jury could "even consider" defendant's statement, the jury should find "it must have been made voluntarily," and if the jury did not so find, the jury "should entirely disregard" it in reaching the verdict. An instruction substantially identical to the instant instruction was given in State v. Laster, Mo., 293 S.W.2d 300, 304, a companion case, and we stated, no issue being presented, "an adequate instruction was given on this subject." In State v. Stibbens, 188 Mo. 387, 396(III), 87 S.W. 460, 462(3), an instruction told the jury "you should take such confession into consideration" if voluntarily made. See State v. Pillow, Mo., 169 S.W.2d 414, 416; State v. Hostetter, Mo., 222 S.W. 750, 753(II); State v. Hartman, Mo., 272 S.W.2d 276 [1, 2]. We are not approving the use of the word "must" in the instruction. A more appropriate word would be "may." However, the jury, if it found defendant voluntarily made the statement, would, unless it violated its oath, consider the statement. The questioned clause was modified by the succeeding clause; and under the instruction, if the statement was made voluntarily, the jury was not told how to consider the statement and was free to give the statement no weight whatever in arriving at the verdict. It stated the duty the law placed upon the jury. We conclude on the record before us that the jury was not misled and reversible error did not occur. Consult State v. Harris, 357 Mo. 1119, 212 S.W.2d 426, 428 [7, 8].

[20] X. Defendant complains of the court's overruling of his motion for a polygraph examination of himself, which he offered to pay for. We see no necessity for requesting a court to rule on a motion of this nature. The authorities are to the effect that the results of lie detector examinations are inadmissible in evidence. 23 C.J.S. Criminal Law § 967, p. 295; 20 Am. Jur. 633, § 762; Henderson v. State of Oklahoma, 94 Okl.Cr. 45, 230 P.2d

495, 23 A.L.R.2d 1292, 1306 (annotation). See State v. Cole, 345 Mo. 181, 188 S.W.2d 43, 51 [12]; State v. Hudson, Mo., 289 S.W. 920 [2].

[21-23] XI. Defendant contends in his motion that the court erred in not sustaining his objection to the prosecuting attorney's statement in argument that defendant failed to go back on the stand and rebut certain testimony adduced by the State in rebuttal to testimony given by defendant while on the stand. The statutory right of an accused to no reference to his failure to testify (Sup.Ct.R. 6.08; § 546.270) may be waived by him. State v. Tiedt, 360 Mo. 594, 229 S.W.2d 582, 587 [8]. It is made clear in State v. Larkin, 250 Mo. 218, 234 (III), 157 S.W. 600, 604 [4], 46 L.R.A., N.S., 13, that when an accused takes the stand in his defense, as in the instant case, his failure to testify on specific facts involved in the case is a legitimate subject for comment by the state in argument. State v. Pierson, 343 Mo. 841, 123 S.W.2d 149, 157 [14]: State v. Smith, Mo., 252 S.W. 662, 667 [14]. Having taken the stand, defendant's failure to deny incriminating facts was open to comment whether the denial should have occurred on an appearance in chief or an appearance in surrebuttal.

The transcript discloses that all matters for consideration here upon the record (Sup.Ct.R. 28.02, 28.08) are in proper form and sufficient.

The judgment is affirmed.

BARRETT and STOCKARD, CC., concur.

PER CURIAM.

The foregoing opinion by BOHLING, C., is adopted as the opinion of the court.

EAGER, P. J., and STORCKMAN, J., and BROADDUS, S. J., concur.

LEEDY, J., not sitting.

APPENDIX B

STATE of Missouri, Respondent,

v.

James William STIDHAM, Appellant.

No. 52406.

Supreme Court of Missouri,
En Banc.
June 5, 1967.

Appeal from judgment of the Circuit Court, Butler County, Howard R. Maness, J., denying prisoner's second motion to vacate judgment of conviction. The Supreme Court, Storckman, C. J., held that in view of fact that prisoner would, regardless of judgment on appeal, be immediately entitled to proceed under provisions of not yet effective amended rule requiring motions to vacate to be in questionnaire form and providing for appointment of counsel if motion presents questions of law or issues of fact and movant is shown to be indigent, prisoner would be granted maximum relief to which he was entitled so that further proceedings could be held in compliance with provisions of amended rule.

Order and judgment reversed and cause remanded with directions.

1. Criminal Law (Key) 998(1)

Although effective date of newly revised rule requiring motion to vacate judgment to be in questionnaire form and providing for appointment of counsel if motion presents questions of law or issues of fact and movant is shown to be indigent is September 1, 1967, trial courts may use the new procedure before that date. V.A.M.R. S.Ct. Rule 27.26.

2. Criminal Law (Key) 998(21)

Amended rule requiring motions to vacate judgment to be in questionnaire form and providing for appointment of counsel if the motion presents questions of law or issues of fact and movant is shown to be indigent is intended to discover and adjudicate all claims for relief in one application and avoid successive motions. V.A.M.R. S.Ct. Rule 27.26.

3. Criminal Law (Key) 1189

In view of fact that regardless of whether denial of prisoner's second motion to vacate judgment of conviction was affirmed or reversed, he would be immediately entitled to proceed under not yet effective amended rule requiring motions to vacate to be in questionnaire form and providing for appointment of counsel if motion presents questions of law or issues of fact and movant is shown to be indigent, prisoner was granted maximum relief to which he was entitled so that order and judgment denying motion were reversed and cause was remanded with directions that all further proceedings be in compliance with amended rule. V.A.M.R. S.Ct. Rule 27.26 (c, e, h, i).

Norman H. Anderson, Atty. Gen., Walter W. Nowotny, Jr., Asst. Atty. Gen., Jefferson City, for respondent.

James William Stidham, pro se.

STORCKMAN, Chief Justice.

The appellant James William Stidham is a prisoner in the Missouri State Penitentiary where he is serving a sentence of life imprisonment for murder. The judgment of conviction was affirmed by this court on September 9, 1957. State v. Stidham, Mo., 305 S.W.2d 7. On March 9, 1964, Stidham, pursuant to S.Ct. Rule 27.26, V.A.M.R. filed pro se in the Circuit Court of Butler County a motion to

vacate and set aside his sentence. The motion to vacate was denied without an evidentiary hearing and on appeal this court on June 13, 1966, affirmed the order and judgment. State v. Stidham, Mo., 403 S.W.2d 616. Thereafter, Stidham filed pro se a second motion to vacate under Rule 27.26 which presented claims not made in his first motion. The trial court without an evidentiary hearing also denied the second motion to vacate and the prisoner's appeal from that order and judgment is now before us. The movant filed a brief pro se in this court and made an oral argument.

[1] On January 9, 1967, this court adopted a revised S.Ct. Rule 27.26. The effective date of the revised rule is September 1, 1967, but the trial courts may use the new procedure before that date. State v. Garner, Mo., 412 S.W.2d 155, 157.

[2] The amended rule was adopted after considerable study and is intended to provide a post-conviction procedure in accord with the principles enunciated in the so-called trilogy of Sanders v. United States, 373 U.S. 1, 83 S.Ct. 1068, 10 L.Ed.2d 148, Fay v. Noia, 372 U.S. 391, 83 S.Ct. 822, 9 L.Ed.2d 837, and Townsend v. Sain, 372 U.S. 293, 83 S.Ct. 745, 9 L.Ed.2d 770. Further in keeping with the teachings of the trilogy, the amended rule is designed to discover and adjudicate all claims for relief in one application and avoid successive motions by requiring motions to be in questionnaire form and by providing for the appointment of counsel if the motion presents questions of law or issues of fact and the movant is shown to be indigent.

[3] These and other provisions intended to furnish more adequate post-conviction relief were not provided by Rule 27.26 in effect at the time the present motion was filed or when the appeal was argued and submitted in this court. It is apparent, however, that regardless of whether

this court affirms the order and judgment, or reverses and remands the cause, the movant will be immediately entitled to proceed under the provisions of amended Rule 27.26 and compliance with the amended rule would be obligatory after September 1 this year. In these circumstances, it would be improvident to process the appeal further and undertake to prepare an opinion on the merits. The maximum relief to which the appellant is entitled in this court is a reversal of the order and judgment of the trial court and a remand for further proceedings under amended Rule 27.26. Bosler v. Swenson, 8 Cir., 363 F.2d 154; Swenson v. Bosler, 386 U.S. 258, 87 S.Ct. 996, 18 L.Ed.2d 33. Furthermore, it appears that appellant's motion raises one or more issues of fact on which appellant would be entitled to an evidentiary hearing.

Accordingly, the order and judgment is reversed and the cause is remanded with directions that all further proceedings be in compliance with the provisions of amended Rule 27.26. If appellant elects to proceed with his motion in the trial court, counsel must be appointed under subparagraph (h) of the amended rule since appellant has been shown to be an indigent person. Counsel should file an amended motion which includes every ground known to the prisoner for vacating, setting aside or correcting his conviction and sentence and the prisoner shall verify the correctness of the motion, including the fact that he has recited all claims known to him, all as required by subparagraph (c) of the amended rule. The trial court then is required to conduct a full evidentiary hearing on the amended motion as required by subparagraph (e) of the amended rule, assuming that the motion raises questions of fact as does the present motion, after which the court then is to decide all issues of fact and questions of law, making findings of fact and conclusions of law as required by subparagraph (i) of amended S.Ct. Rule 27.26.

All of the Judges concur.

APPENDIX C

STATE of Missouri, Respondent,

v.

James W. STIDHAM, Appellant.

Nos. 45537, 54674.

Supreme Court of Missouri,
Division No. 2.
Feb. 9, 1970.

The Supreme Court set aside its affirmance of prior postconviction judgment and remanded cause for amendment of motion to vacate in view of revised postconviction procedure. The Circuit Court of the City of St. Louis, Michael F. Godfrey, J., and the Circuit Court of Butler County, Randy Weber, J., entered judgment from which petitioner appealed. The Supreme Court, Barrett, C., held that even though indictment did not charge conspiracy, instruction hypothesizing that defendants conspired, acted in concert, and aided and abetted in killing did not violate due process on theory that it violated constitutional proscription against jury's consideration of crime not included in indictment where evidence supported hypothesis, indictments charged defendants with killing victim by assault with deadly weapons with malice aforethought and conspiracy was inherent and may have been incidentally included offense.

Affirmed.

1. Constitutional Law (Key) 268(2)

Even though indictment did not charge conspiracy, instruction hypothesizing that defendants conspired, acted in concert, and aided and abetted in killing did not violate due process on theory that it violated constitutional pro-

scription against jury's consideration of crime not included in indictment where evidence supported hypothesis, indictments charged defendants with killing victim by assault with deadly weapons with malice aforethought and conspiracy was inherent and may have been incidentally included offense. V.A.M.S. Const. art. 1, § 18(a); Sections 544.250, 556.120, 556.130, 556.170 RSMo 1959, V.A.M.S.

2. Constitutional Law (Key) 268(2)

Instruction defining conspiracy and stating that all persons who are guilty of acting in concert and together in commission of crime are principals did not infringe on due process by allowing state to prove and jury to be instructed to consider crime not included in indictment where instruction was warranted by statute and there was evidence of conspiracy, actual participation in and consummation, in conspiracy by defendants even though indictment did not charge conspiracy. V.A.M.S. Const. art. 1, § 18(a); Sections 544.250, 556.120, 556.130, 556.170 RSMo 1959, V.A.M.S.

3. Constitutional Law (Key) 268(8)

Record containing corroboration for testimony of two witnesses, alleged to have given perjured testimony, failed to establish violation of due process by state's knowing use of perjured testimony based on fact that such witnesses who had been inmates, had had their sentences commuted and had been released from prison. V.A.M.R. Crim. Rule 27.26.

4. Constitutional Law (Key) 268.1(3)

Where defendant was not prosecuted by information, but by indictment, eliminating need for preliminary hearing, failure of court to appoint counsel at preliminary hearing, even though defendant requested counsel at such hearings, did not deny defendant due process of law. Section 544.250 RSMo 1959, V.A.M.S.

5. Criminal Law (Key) 998(17)

Record, including many pretrial motions by defendant's counsel, failed to support defendant's allegation of lack of counsel prior to trial.

6. Criminal Law (Key) 531(3)

Record failed to support claim that defendant's confession was extracted through physical force and threats of physical force by being beaten with cork ball bat and by not being given any food or water for three days.

7. Constitutional Law (Key) 266

Where, after trial judge overruled motion to suppress confession, all witnesses testified to same facts and circumstances as they had on motion to suppress as it related to issue of voluntariness, and upon this testimony issue of voluntariness was submitted to jury, court's procedure for determining voluntariness did not fail to comport with minimum standards of due process.

8. Criminal Law (Key) 1172(2)

Instructions on voluntary confession were not prejudicially erroneous where there was, at time of trial, only claim that oral and written confessions were obtained by physical force and violence, and no claim of mental coercion and where claim of mental coercion was not raised until 13 years later on motion to vacate sentence. V.A.M.R. Crim. Rule 27.26.

9. Criminal Law (Key) 998(6)

Where, at time defendant gave his statements, circumstances surrounding victim's death and defendant's part in it were known, and defendant's statements played but little if any part in his conviction in view of other testimony,

claim that statement was not voluntary, on ground that three errors, one in age, one in place of residence and prior record, conclusively established that statement was not voluntary, was not ground for postconviction relief. V.A.M.R. Crim. Rule 27.26.

10. Criminal Law (Key) 532

In view of trial court's opinion that statement given by defendant "is and should be admissible in evidence" supported by cogent and convincing evidence, allowing statement to go to jury did not violate Supreme Court decision establishing procedure for admission of confession.

John C. Danforth, Atty. Gen., Kenneth M. Romines, Asst. Atty. Gen., Jefferson City, for respondent.

Mark M. Hennelly, St. Louis, for appellant.

BARRETT, Commissioner.

In 1952 James William (known to one and all as "Slick") Stidham was sentenced to 25 years' imprisonment for his part in the armed robbery of the Grapette Pottling Company in Joplin. For the details of that crime see State v. Stidham, Mo., 258 S.W.2d 620. On October 3, 1955, after a jury trial and verdict in July 1955, Stidham was sentenced to life imprisonment for his participation in the slaying of fellow-inmate Walter Lee Donnell on September 22, 1954, at the height of the riot of approximately 800 inmates of the main prison in Jefferson City. In the trial of the latter case and now, at the behest of Father Clark, he has been represented by a distinguished lawyer, Mr. Mark M. Hennelly, then a successful and experienced criminal lawyer, now a vice-president and general counsel of one of the larger railroads. The murder conviction was appealed upon a full transcript of three volumes, there

was a complete appellate review, the opinion was turned into twenty-three headnotes, after counsel raised what he deemed, no doubt every conceivable point and error. That conviction of murder was affirmed on September 9, 1957, in State v. Stidham, Mo., 305 S.W.2d 7. In view of some of the problems now raised it should be pointed out that before the murder case reached trial stage Stidham's diligent counsel filed every conceivable motion and plea, including the right to a change of venue which accounts for the trial in Butler County, many miles from Jefferson City. Over the years, following the affirmation of the life sentence, Stidham has lodged in this court innumerable letters, communications and pro se motions and they have all been responded to. In June 1966 he personally filed and argued an appeal from a 27.26, V.A.M.R. proceeding in Butler County in which he attempted to present several of the issues now before the court. State v. Stidham, 403 S.W. 2d 616. In the meanwhile the court en banc revised its post-conviction procedure, and Stidham having unsuccessfully instituted another 27.26 proceeding, this court set aside its affirmance of the prior post-conviction judgment and remanded the cause for an amendment of the motion to vacate "which includes every ground known to the prisoner," and in the spirit of the rule for "a full evidentiary hearing" on all questions of fact. The order and judgment in that opinion is reported in State v. Stidham, 415 S.W.2d 297. And on that proceeding, on Stidham's behalf, there has been a change of venue from Butler County and there has been a new and complete hearing before Honorable Michael F. Godfrey, a circuit judge in St. Louis. Furthermore, in response to what was deemed to be the spirit of the Bosler cases, (Bosler v. Swenson, 8 Cir., 363 F.2d 154 and Swenson v. Bosler, 386 U.S. 258, 87 S.Ct. 996, 18 L.Ed.2d 33) the court en banc set aside the judgment of this court upon the original appeal, 305 S.W.2d 7, and again appointed Mr. Hennelly

to represent Stidham in both cases. As indicated, there was a full hearing on the 27.26 proceeding, all issues were found against Stidham and he has appealed the judgment in that case. In the order setting aside the original submission the two causes were consolidated and are to be disposed of in this opinion. It should be stated in this connection that Mr. Hennelly has raised, extensively briefed, and orally argued every conceivable claim of error in the original trial, all of which covers and includes every possible right to relief in a post-conviction proceeding.

One of the claims of infringement of due process is that the state was "allowed to prove and the jury was instructed to consider a crime not included in the indictment." Const.Mo. Art. I, Sec. 18(a), V.A.M.S. Thus, it is said, he was indicted for the murder of Donnell, but he "was not, however, indicted for participating in a conspiracy to kill Donnell." Therefore, it is urged that the court erred in admitting in evidence conversations and conduct on the part of others engaged in slaying Donnell. By the same token it is contended that the court prejudicially erred in instructing the jury in referring to and hypothesizing a concert of action, an aiding and abetting in slaying Donnell. In the first place the argument overlooks not only the theory but the specific allegations of the indictment. And in the second place it ignores the facts of Donnell's killing, the circumstances in which he was savagely murdered. While Stidham, as well as his codefendants, was given a severance, the indictment charged that "William R. Hoover, Jackie Lee Noble, Paul Edward Kenton, James William Stidham, Rollie Laster, Don Wm. DeLapp and Joseph M. Vidauri[1]

1. The details of Donnell's murder are set forth in the records and appeals of Stidham's codefendants: State v. Laster, 365 Mo. 1076, 293 S.W.2d 300 (certiorari denied 352 U.S. 936, 77 S.Ct. 237, 1 L.Ed.2d 167); State v. Noble, Mo., 387 S.W.2d 522; State v. Kenton, Mo., 298 S.W.2d 433; State v. Vidauri, Mo., 293 S.W.2d 955 and State v. Vidauri, Mo., 305 S.W.2d 437.

* * * did then and there feloniously, wilfully, deliberately, premeditatedly, on purpose and of their malice aforethought, make an assault upon one Walter Lee Donnell and then and there with dangerous and deadly weapons, to wit: a sledgehammer, and a knife, and another sharp instrument or dagger * * * a wooden table leg, and other blunt instruments * * * and their fists and hands and feet * * * strike, hit, stab, cut, beat and stomp" and thereby kill Donnell. The testimony was that Kenton held Donnell while Laster stabbed him with an ice pick, Stidham "slashed" him with a knife, and two others hit him in the head with a sledgehammer. In addition to other bruises and contusions an autopsy on Donnell's body revealed "a severe mashed in, or compressed area in the right side of the face approximately just underneath the right eye, that extended back, involving the right ear with separation of the lower part of the ear, lower part of the ear was torn away from the body about a third of its normal attachment area." There was a multiple, crashing, "eggshell type fracture" of the skull, two knife-cut wounds of the neck, five puncture or stab wounds in the chest and four stab wounds in the back. The doctor said that two of the stab wounds had entered the heart cavity and of course were fatal. The testimony showed that until the three doors to Death Row were forced and Stidham and Laster released and Stidham furnished a knife DeLapp led the group bent on killing Donnell. As soon as Stidham was released DeLapp put his arm around Stidham's shoulders and said, "Gentlemen, I have brought you this far, this is your leader from here on." And shortly this group gained entrance to Donnell's cell and killed him. Prior to the riot Stidham had repeatedly threatened to kill both Donnell and James M. Creighton.

[1] This briefly narrated record completely refutes the appellant's claim of an invasion of due process in

submitting "a crime not included in the indictment." The indictment did not in terms charge the misdemeanor offense of conspiracy (RSMo 1959, §§ 556.120, 556.130, V.A.M.S.), even though inherent in the circumstances it may have been an incidentally included offense. Principal instruction number 4 hypothesized that the seven named defendants "entered into a conspiracy and agreement" and "acting in concert and together" and "aided, abetted, assisted or encouraged" in slaying Donnell but, as indicated, the evidence supports the hypothesis. There was a separate conventional instruction defining "conspiracy" stating that "all persons are principals who are guilty of acting in concert and together in the commission of a crime."

[2] The latter instruction was not only warranted by specific statute (RSMo 1959, § 556.170), upon this record, as the court held on the previous appeal, State v. Stidham, 305 S.W.2d l. c. 15, "there was ample evidence for a finding of the conspiracy submitted and the actual participation in and consummation of the said conspiracy by the persons named in the instruction." A case directly in point in every respect is State v. Holloway, 355 Mo. 217, 195 S.W.2d 662, an instance of a murder in a jailbreak. Excerpting, the court said, "Goldie and Buster were co-conspirators with appellant. Their testimony was competent in establishing the fact of the common design or conspiracy. * * * Conversations between Goldie and Buster were competent evidence against appellant although made outside of appellant's presence. * * * Furthermore, *proof that appellant and others conspired together to commit an unlawful act and that the killing occurred in furtherance of the conspiracy may be shown under an indictment or information charging first degree murder only.*" (Emphasis supplied.)

Relying on Napue v. Illinois, 360 U.S. 264, 79 S.Ct. 1173, 3 L.Ed.2d 1217, appellant contends that due process was violated in that the state knowingly used perjured testimony. This assignment is leveled at the state's use of Herman Trout and James Creighton, also prison inmates, as witnesses. (For a partial review of Creighton's bizarre life from a sentence of death in 1932 to a commutation of prison sentence in 1956 see State v. Creighton, 330 Mo. 1176, 52 S.W.2d 556.) The argument now is directed solely to the fact that the sentences of Creighton and Trout have been commuted and they have been released from prison. In the trial of this cause there was first a motion to disqualify Creighton as a witness upon the allegation that he was of unsound mind. That motion was heard at length, all medical and psychiatric records from the State Hospital at Fulton were introduced, and the court found as was all but obvious that he was indeed not incompetent as a witness. See State v. Stidham, 305 S.W.2d l. c. 13. Upon the original trial and appeal it was sought to establish the claim of perjured testimony or incompetent witness by offering to prove that while Creighton was held in the Cole County jail he was granted special favors, particularly that "he had access to one Mary Annis" (305 S.W.2d 7) despite the appellant's proof from the Fulton Hospital records that Creighton "is a homosexual."

[3] In any event and apart from the federal cases, this court has long since "recognize(d) that a judgment obtained by the knowing use of perjured testimony should be vacated upon a proper factual showing." State v. Garton, Mo., 396 S.W.2d 581. The insuperable difficulty with this particular claim of infringement of due process is that it is not supported by the record. Annotation 3 L.Ed.2d 1991. The only circumstance now present as to both Creighton and Trout is the fact that in July 1955 they did testify as state's witnesses and subsequently

their sentences were commuted by the then Governor of Missouri. And again, on this issue, there was a hearing on the 27.26 motion and aside from the bare fact of the commuted sentences the court found as did another court in 1964 (State v. Stidham, 403 S.W.2d 616) that "(t)he record is barren of facts to support such allegations." It is not necessary to detail their testimony, their evidence and that of numerous other witnesses is all set forth in the appeals of at least five of the participants in Donnell's slaying. On the 27.26 hearing the trial court could have added, after reading the record in Stidham's original appeal, that the testimony of Creighton and Trout was cogently corroborated in every detail by a number of physical facts and by other witnesses, particularly by the prison guard, Mr. Dietzel, on duty in Death Row when Donnell was murdered. In contrast to the testimony of Creighton and Trout there is no corroboration whatever of Stidham's testimony that he went up to B-Hall and spent the night of the riot innocently listening to the radio, had no knowledge of Donnell's slaying and took no part in the riot. The one incriminating circumstance that even he has never and cannot brush away is the conceded fact that after the three doors to Death Row were broken open and after his cell was unlocked he, unlike others and undoubtedly contrary to prison rules, did leave Death Row. Thus upon this record there was no support for the charge of knowing use of perjured testimony.

A further due process point is the claim of the "court's failure to make timely appointment of counsel." Here the appellant relies upon Escobedo v. Illinois, 378 U.S. 478, 84 S.Ct. 1758, 12 L.Ed.2d 977; Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694; Powell v. Alabama, 287 U.S. 45, 53 S.Ct. 55, 77 L.Ed. 158 and other landmark cases dealing with the appointment of counsel. It is not necessary here to again examine those cases, their standards

are recognized and applied even though the Miranda and Escobedo cases are not retroactive. Johnson v. New Jersey, 384 U.S. 719, 86 S.Ct. 1772, 16 L.Ed.2d 882. There is no factual similarity in this and any of the cited cases, particularly, for example, as in White v. Maryland, 373 U.S. 59, 83 S.Ct. 1050, 10 L.Ed.2d 193, and Arsenault v. Massachusetts, 393 U.S. 5, 89 S.Ct. 35, 21 L.Ed.2d 5, in which there were pleas of guilty at the preliminary or "at a probable cause hearing" and the pleas were introduced in evidence upon the jury trials. In certain instances in which there has been manifest injustice, this jurisdiction recognized the importance of the right to counsel long before Escobedo and Miranda. See Ex parte Stone, Mo.App., 255 S.W.2d 155; State v. Jackson, 344 Mo. 1055, 130 S.W.2d 595 and State v. Witt, Mo., 422 S.W.2d 304.

The appellant's complaint as to counsel arose in and for the most part is based upon these circumstances: Initially the prosecution of these seven defendants for this particular offense was instituted by the prosecuting attorney in a magistrate court and preliminary hearings were held, a necessary prerequisite and procedure before a formal information could be filed in the circuit court. RSMo 1959, § 544.250. Appellant and his counsel make much ado of the fact that at one of these preliminary hearings he demanded counsel and yelled out asking for some lawyer to come forward. In his brief it is said that there was no appointment of an attorney "until the second arraignment" and in this connection stated that he was never advised of his right to a lawyer—even though he requested one at the preliminary—and that he was entitled to counsel before his mental examination at the United States Medical Center in Springfield.

[4] The basic fallacy in the appellant's contention on this phase of the case is that again there is no factual

basis for his claim of an infringement of rights at a preliminary. In the first place there is neither claim nor proof that anything done or said at any preliminary hearing or in any medical or mental examination was employed against him or that the state even secured any relevant information. State v. Smith, Mo., 411 S.W.2d 208. But more important and decisive here as to counsel at a preliminary hearing is the fact that Stidham was not prosecuted by information. On November 23, 1954, a grand jury returned an indictment charging Stidham and his accomplices with the murder of Donnell. Thus there was no occasion or place for a preliminary hearing. "It is a well-established law of this State that the grand jury may investigate and indict one charged with a felony although he has been arrested and held for a preliminary examination, and is not bound to await the action of the examining court, for the reason that the action of the examining court is no bar to the right of the grand jury to inquire into the case and indict the accused, even though he has been discharged on the preliminary examination." State v. Gieseke, 209 Mo. 331, 339, 108 S.W. 525, 527.

[5] As a matter of fact, other than appellant's assertions, there is no record support for his charges of lack of counsel prior to trial. Whatever may have occurred at any preliminary has not been made a part of this record. In any event, as stated, an indictment was returned, the defendants, the indisputable record recites, were duly arraigned, each defendant was furnished a copy of the indictment and upon the request of Stidham for the appointment of a certain lawyer, the court appointed Mr. Hennelly. Thereafter there were no motions or proceedings or even references to a preliminary hearing or to anything that may have occurred during such a hearing. Mr. Hennelly was appointed to represent appellant on November

23, 1954, and on December 6, 1954, a formal plea of not guilty was entered. Almost immediately, on December 14, 1954, on Stidham's behalf, there were motions for production and inspection of any statements that may have been given, a motion to dismiss for the reason of two offenses—homicide and assault with intent to kill, a motion for a severance, a motion for a polygraph examination and a motion to suppress any statement he may have given. These procedures were all considered in turn and disposed of, including a motion for a continuance and finally an application for a change of venue. The cause proceeded to trial and in the first instance a mistrial was declared when it was discovered that certain jurors were reading newspaper accounts of the trial. In the present 27.26 proceeding, after an unrestricted hearing, the court found these issues with respect to counsel against appellant, that is the court found that failure to appoint counsel at any preliminary stage of the cause or during his interrogation by police and prison authorities had not infringed any of appellant's constitutional rights and that finding is convincingly supported by the record. State v. Donnell, Mo., 430 S.W.2d 297; Crosswhite v. State, Mo., 426 S.W.2d 67. As a matter of fact appellant's interrogation in connection with the prison riot and Donnell's slaying is more appropriately considered in connection with his assertion of involuntary confession.

There is a threefold assignment of error in this respect, neither of which would necessarily result, as the appellant seems to think, in his exoneration and release from imprisonment. It is first urged in general terms that the court erred in admitting in evidence exhibit 16, his own handwritten confession. It is said that its admission deprived appellant "of his liberty without due process of law." This allegation is not a briefed and argued point; in connection with it, however, it is contended that the court's

procedure for determining voluntariness "did not comport with the minimum standards" of due process in that "no specific finding of voluntariness was made by the judge prior to submitting the issue to the jury." In the second place it is said that under the evidence "the alleged confession was coerced, involuntary, and taken in violation of the defendant's Constitutional rights," meaning presumably, that upon the record the confession was involuntary as a matter of law. A third and connected point is that the instruction submitting the issue to the jury was erroneous "by failing to properly instruct the jury on the Constitutional standards to be used in making their determination as to the voluntariness" of the confession. The latter point is not too clear—in some aspects it would seem to say that a question of law should have been submitted to the jury. In the argument of this contention, presented as a separate point, it is said that the jury was given an "unconstitutional standard." At another point it is said that the instruction failed to include or submit "mental coercion or duress" and, therefore, under State v. Williams, Mo., 369 S.W.2d 408, was prejudicially erroneous. Thus the complete gamut of involuntary confessions is sought to be invoked one way or another.

It is necessary at this point and as to all claims of involuntary confession to have some understanding of the record and the context and manner in which they arose. In this case, in addition to all other motions, there was a separate motion to suppress "any and all statements," oral or written, that Stidham may have made for the specified reason that the "alleged statements were involuntary and *as a result of physical force and threats of physical force applied against this defendant* by police officers of the City of St. Louis, guards of the Missouri State Penitentiary and officers of the Missouri Highway Patrol." (Emphasis sup-

plied.) That motion was filed on December 14, 1954, and the record recites that it was overruled on December 20, 1954. That motion was filed and passed on while the cause was pending in Cole County and it does not appear just what if any evidence was heard before the court passed on the motion. Thereafter, when in the course of the trial in July 1955 it appeared for the first time from the testimony of a highway patrol sergeant that Stidham's oral and written confessions were to be employed defendant's counsel, even in 1955, and unlike in State v. Williams, "moves the Court to conduct a preliminary examination and asks the Court to inquire into the voluntariness of the statement, and to determine whether the statement was given voluntarily, either the oral or the written statement." Thereupon the court interrupted the trial and out of the jury's presence and hearing conducted a hearing on appellant's motion.

Highway patrol officers, St. Louis police, prison officials and all others present when Stidham's statements were made or given were examined at length and in detail as to the circumstances in which they were given. It is not necessary to detail the circumstances. Stidham in testifying upon the trial and the motion said that after he was taken to the field house in the recreation area where the investigation into the riot and, incidentally, Donnell's murder, was being conducted, he was handcuffed, "a rope (was fastened) between the handcuffs * * * I was lifted up in the air where all my weight had to bear on my two arms." He said that the police officers and patrol officers, fifteen to twenty, left him thus suspended from the ceiling for fifteen minutes and then because he refused to give a statement they again lifted him up and beat him with cork ball bats until he passed out. And, he said, that as a result of this treatment "I agreed to write a statement that they dictated to me."

And so after his oral statements and despite his paralyzed arm he wrote the statement and the officers, unspecified, forced him to sign it.

[6-8] Contrary to Stidham's testimony the several officers who took part in the interrogation, accounted for Stidham's presence, every minute of time, and his treatment from the time on September 22nd he was moved from Death Row to O-Hall and finally on September 27th when he was escorted from O-Hall to the recreation area and his interrogation which lasted less than thirty minutes. Incidentally Stidham was confined in solitary in Death Row as punishment and for safekeeping because of an attempt to escape the previous January. Creighton was likewise an incorrigible and confined in Death Row, a maximum security area, as punishment. And the inference is that Donnell, thought by the prison population in general and Stidham and his friends in particular to be a snitch was confined there for his personal safety. In any event, the officers, one by one, denied the use of force, threats or violence. Donnell was murdered on September 22nd and the officers say that except in passing Stidham was not questioned until he gave the statements on September 27th. He claims, however, that when he was moved to O-Hall he was placed in a bare cell, without running water, that the windows were broken and he was only allowed "to keep a pair of pants and shoes on" and he said that he was not "given any food or water for three days." All of this testimony was denied by the prison authorities even though during a part of the time order had not been restored and some buildings were still burning. Without narrating even briefly, the testimony in contradiction of Stidham's uncorroborated claims was all but overwhelming and even giving some credence to his version the circumstances do not approach those of Brooks v. Florida, 389

U.S. 413, 88 S.Ct. 541, 19 L.Ed.2d 643, which "case documents a shocking display of barbarism." And again, after overruling the latter motion to suppress, all these witnesses testified to the same facts and circumstances and upon this testimony the issue of voluntariness was submitted to the jury. There was in point of fact upon the trial of the cause no claim of mental coercion, the claim was that the oral and written confessions were obtained by physical force and violence. And this is what Mr. Hennelly argued to the jury, it was not until his 27.26 hearing, thirteen years later, that there was a claim of mental duress. In these circumstances, as upon the original appeal, the then conventional instructions on voluntary confession were not prejudicially erroneous. State v. Laster, 365 Mo. 1076, 293 S.W.2d 300; State v. Stidham, Mo., 305 S.W.2d l. c. 16-18.

[9] In view of the insistent argument one other matter should be noted. In addition to his oral statements this is Stidham's confession, admittedly written by him:

> "Kenton held Donald while Laster stabbed him several times with a ice pick, at the same time I slashed at him three or four times around the face and neck with a knife that Kenton gave me when he opened the door, when Donald fell to the floor Linder and Thompson each said get Donald with the sledge and they proceeded to hit him with a sledgehammer and crowbar; during this time someone was holding a flashlight that Kenton previously had. When we left the cell Donald was lying on his back with his head pointed toward the door. The knife I had was a regular kitchen knife about six or seven inches in length, when I got back upstairs in B-Hall, I threw the knife on the floor near the west end on the south side of the building."

In this statement, according to the appellant, there are three errors which he says demonstrate that the six officers signing as witnesses dictated the statement thus conclu-

sively establishing that the statement was not voluntary. The statement recites his age as 25 when in fact, as shown by his birth certificate, he was 28. His residence was given as Kansas City when in fact he had not lived there and, three, although not to be found in the statement that he was credited with three prior felony convictions when in fact he had but two—one, he says, having been "nullified." The officers all say that they had no personal knowledge of these items except as Stidham wrote them in his statement. And to further confuse this issue when he was in the medical center in Springfield the documents he introduced in evidence show that in two instances he gave his age as 32. If these details are of any significance upon the issue of voluntariness it could be pointed out that in the statement Creighton's name is misspelled "Crayton" and repeatedly Donnell's name is misspelled "Donald" and he does not claim that the officers directed him to thus misspell these names. And more significantly as to the slaying of Donnell, the statement says that "Paul Kenton unlocked my door" but upon his 27.26 hearing, years later, he says "It was some colored fellow. I don't remember who it was. I think it was Ford." Thus not only is there a direct conflict in the testimony, upon the appellant's own version there looms a large credibility gap. And in this connection, by the time Stidham was brought to the interrogation center on the 27th of September there was but little point in obtaining a statement, let alone a confession, from him. By that time the guards had all been released from the rioters' custody and the cells, particularly Mr. Dietzel, and they along with Stidham's co-defendants had supplied all the details of the riot as well as the killing of Donnell. By the time Stidham gave his statements there was no mystery as to Donnell's death or as to Stidham's part in it and upon this record the statement played but little if any part in his conviction.

All that has gone before in this opinion is but background and preliminary to appellant's principal claim that the trial of his case, particularly as to his oral statements and his confession, does not meet the standards of Jackson v. Denno, 378 U.S. 368, 84 S.Ct. 1774, 12 L.Ed.2d 908; Davis v. North Carolina, 384 U.S. 737, 86 S.Ct. 1761, 16 L.Ed.2d 895; Haynes v. Washington, 373 U.S. 503, 83 S.Ct. 1336, 10 L.Ed.2d 513; Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694; Brooks v. Florida, supra, and numerous other landmark federal cases concerned with the subject of voluntary confessions. It is not necessary here to attempt an explication of these cases, that has been done several times and their mere citation indicates an awareness of their significance and controlling force. One of the latest explications of these and numerous other cases is Parker v. Sigler, 413 F.2d 459 and it is sufficient here to say that the interpretation of the Eighth Circuit Court of Appeals is accepted.

[10] The first and basic weakness of appellant's presentation is his failure to recognize that unlike Jackson v. Denno this jurisdiction does not apply or follow the so-called New York rule in determining the voluntariness or involuntariness of confessions, Missouri employs the so-called Massachusetts procedure "impliedly approved in Jackson v. Denno," State v. Washington, Mo., 399 S.W.2d 109, 114. Upon the trial of this case, after the appellant's motion and the indicated hearing before the court, out of the jury's hearing, the court made this order: "* * * it is the Court's opinion that the matters concerning the statement should be offered in the presence of the Jury, subject of course to any attacks as to its credibility by the Defendant. The Defendant has of course the right to proceed to challenge the voluntariness of the statement and confession, even before the Jury, but it is the Court's opin-

ion that upon the evidence that has been offered before the Court and outside of the hearing of the Jury, that *the statement is and should be admissible in evidence.*" Only a single word is missing, the court unfortunately did not in the italicized clause employ the word "voluntary," nevertheless, the meaning and intent are implicitly plain. "Although the judge need not make formal findings of fact or write an opinion, his conclusion that the confession is voluntary must appear from the record with unmistakable clarity." Sims v. Georgia, 385 U.S. 538, 544, 87 S.Ct. 639, 643, 17 L.Ed.2d 593, 598. It is not necessary to again detail the conflicting evidence and demonstrate, as indicated from even a brief recitation upon the "totality of the circumstances" (Clewis v. Texas, 386 U.S. 707, 87 S.Ct. 1338, 18 L.Ed.2d 423) the judge's finding of voluntary confession, prior to submission to the jury, was indeed supported by cogent and convincing testimony. State v. Hester, Mo., 1425 S.W.2d 110; Crosswhite v. State, Mo., 426 S.W.2d 67; State v. Williams, Mo., 416 S.W.2d 956; State v. Glenn, Mo., 429 S.W.2d 225.

And if this does not suffice, thirteen years later, upon the 27.26 hearing the appellant was again given full opportunity to attack the previous finding and record and he did so but the court on change of venue found the issues against appellant. It may be interpolated that upon the latter hearing he for the first time attempted to inject the issue not alone of a confession produced by "police brutality" but of mental duress and coercion. But here he attempts to connect the murder of Donnell and the events of September 22 and 27, 1954, with his prior confinement and general treatment for infraction of rules and attempt-to-escape events and treatment completely disassociated with the riot and slaying. Needless to say, these are "scarcely factors of involuntariness in a plea." Verdon v. United States, 8 Cir., 296 F.2d 549, 552. But again and

upon this issue and in the new 27.26 hearing the patrol, police and prison officials were again called, including Patrolman Barton whom Stidham had accused as one of his tormentors and he denied that he ever at any time interrogated or handled Stidham, although he had talked to Creighton, Trout, Laster, Noble, Hoover, DeLapp and Vidauri. In any event all these witnesses, all produced by the state, categorically or implicitly refuted all of Stidham's claims of mistreatment, either physical or mental. And upon this new hearing and record another circuit judge made another complete finding of law and fact. The court found, citing the Glenn and Washington cases, supra, that Judge Randolph Weber in 1954 had "followed the correct procedure in determining the issue of voluntariness of the confession and specifically made a finding relative thereto and this Court now so finds that the correct procedure was utilized." And finally the court found, as had the previous court, that the oral and written confessions were voluntary and, needless to add, the latter finding is overwhelmingly supported and procedurally and factually the cause meets all the requirements of the federal cases and there has been no invasion of due process. Crosswhite v. State, State v. Glenn and State v. Williams, supra.

Accordingly the original judgment, State v. Stidham, Mo., 305 S.W.2d 7, is affirmed and the judgment in the 27.26 proceeding is likewise affirmed.

STOCKARD and PRITCHARD, CC., concur.

PER CURIAM:

The foregoing opinion by BARRETT, C., is adopted as the opinion of the court.

All of the Judges concur.

APPENDIX D

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MISSOURI WESTERN DIVISION

JAMES WILLIAM STIDHAM, Petitioner,
vs.
HAROLD R. SWENSON, Respondent.
Civil Action No. 18121-2

Memorandum and Order Denying Petition for Habeas Corpus

(Filed May 15, 1970)

Petitioner is an inmate of the Missouri State Penitentiary serving a sentence of life imprisonment upon conviction of a first-degree murder. Petitioner filed a petition for habeas corpus asserting that his conviction is void because it was rendered without due process of law and in violation of the Fifth, Sixth, and Fourteenth Amendments.

In May, 1952 petitioner was sentenced to a 25-year term in the Penitentiary for robbery. While serving his term, he was accused and convicted in 1955 of killing another inmate, for which he was sentenced to a life term. Petitioner appealed his conviction which was affirmed by the Supreme Court of Missouri in 1957. See 305 S.W. 2d 7. In 1964 he filed a 27.26 motion to vacate his sentence which was denied without an evidentiary hearing. On appeal, the Missouri Supreme Court affirmed. See 403 S.W. 2d 616. Thereafter, petitioner filed a second 27.26 motion alleging new grounds, which was also denied without an evidentiary hearing by the trial court. The Supreme Court of Missouri reversed and remanded on appeal (415 S.W. 2d 297) and

on December 5, 1968, an evidentiary hearing was held in the St. Louis City Circuit Court. This hearing resulted in a denial of relief under the 27.26 motion, which judgment was appealed to the Supreme Court and consolidated with another appeal for hearing by the court en banc. The Supreme Court on February 9, 1970 affirmed the decisions of the lower courts. 449 S.W. 2d 634.

Petitioner then filed a petition for habeas corpus in this Court, and on March 2, 1970, a show cause order was issued, since it appeared that petitioner had exhausted his available state remedies and might have stated a violation of one or more of his federally protected rights. The respondent filed with this Court, in response to the show cause order, the transcripts of the records on appeals (Missouri Case Nos. 45537 and 54674), briefs and arguments of the parties, and the opinions of the Supreme Court of Missouri. It appears to the Court that this record is complete and that it fully demonstrates that the petitioner has exhausted his available state remedies.

The petitioner alleges seven grounds for relief: (1) that he was tried and convicted upon a charge of conspiracy which was not included in the indictment; (2) that he was deprived of assistance of counsel at two critical stages of his trial; (3) that he did not knowingly or competently waive the assistance of counsel at any stage of the proceedings against him; (4) that certain members of the Missouri State Highway Patrol and personnel of Missouri State Penitentiary exerted physical and mental punishment upon him to secure a confession from him; (5) that the trial judge admitted the confession into evidence without first making a clear and specific finding that the said confession was voluntary; (6) that Instruction No. 6 given at the trial did not fully set out the constitutional standards for the jury's guidance to determine the voluntariness of the said con-

fession; and (7) that the State of Missouri knowingly used perjured testimony of two convicts to obtain the conviction of petitioner.

The facts are fairly well set out in *State* v. *Stidham*, 305 S.W. 2d 7. Very briefly, in 1952 petitioner was sentenced to 25 years' imprisonment for his part in the armed robbery of Grapette Bottling Company in Joplin, Missouri. (See *State* v. *Stidham*, 258 S.W. 2d 620.) On October 3, 1955, after a jury verdict of guilty, petitioner was sentenced to life imprisonment for his participation in the murder of a fellow inmate, Walter Donnell, on September 22, 1954, during the riot of 800 prisoners in the Missouri State Penitentiary.

Petitioner's first contention is that the state was allowed to prove and the jury instructed upon the charge of conspiracy to murder which was not included in the indictment. The indictment did not charge conspiracy; but it did charge seven persons with the murder of Donnell. Even though petitioner and the other named defendants were granted severances, the indictments in each trial named all seven of them. Further, the evidence showed that the defendants had acted in concert. An objection was leveled against Instruction No. 4 because it hypothesized that each had entered into a conspiracy and had acted in concert and "aided, abetted, assisted or encouraged" in the slaying. Under Missouri law all persons who are guilty of acting in concert in the commission of a felony are considered principals and are charged, tried, convicted and punished in the same manner. (See V.A.M.S., § 556.170.) There is no merit to the claim that murder and conspiracy to commit murder (which was in fact accomplished) are such different charges that petitioner could not have been prepared to defend himself. Furthermore, there is direct authority for instructing and proving a con-

spiracy to commit murder under an indictment charging first-degree murder. *State* v. *Holloway*, (Mo. Sup.) 195 S.W. 2d 662 (cited by the Missouri Supreme Court) states:

> (P)roof that appellant and others conspired together to commit an unlawful act and that the killing occurred in furtherance of the conspiracy may be shown under an indictment or information charging first degree murder only.

Petitioner next contends that he was deprived of effective assistance of counsel at two critical stages of his trial and that he did not knowingly or competently waive such assistance at any time. These times were while he was being interrogated by the police and at his first arraignment.

Factually, there were two arraignments. The first was instituted by the prosecuting attorney on an information in the magistrate court. There petitioner demanded counsel, and shouted out in the courtroom for counsel, but his request was denied. A plea of not guilty was entered for petitioner. Preliminary hearings were held as required by V.A.M.S., § 544.250. Petitioner was later rearraigned on an indictment returned by the grand jury of Cole County, and at that time counsel was appointed for him. Petitioner contends that this late appointment of counsel resulted in the denial of effective assistance of counsel under the standard of *Powell* v. *Alabama*, 287 U.S. 45.

The failure to appoint counsel at interrogation has been established as a denial of due process by *Escobedo* v. *Illinois*, 378 U.S. 478, and *Miranda* v. *Arizona*, 384 U.S. 436. However, these cases are not retroactive (*Johnson* v. *New Jersey*, 384 U.S. 719) and do not control here.

The more serious question concerns the failure to appoint counsel at the time of the first arraignment, which

petitioner claims resulted in denial of due process. Petitioner cites *Hamilton* v. *Alabama*, 368 U.S. 52, *White* v. *Maryland*, 373 U.S. 59, and *Arsenault* v. *Massachusetts*, 393 U.S. 5, as authority. The Missouri Supreme Court in their opinion 449 S.W. 2d 634 distinguished the latter two cases by stating that "(t)here is no factual similarity in this and any of the cited cases . . . (citing *White* v. *Maryland, supra*, and *Arsenault* v. *Massachusetts, supra*) in which there were pleas of guilty at the preliminary or 'at a probable cause hearing' and the pleas were introduced in evidence upon jury trials." However, in *Hamilton* v. *Alabama*, from which the holdings in *White* and *Arsenault* were drawn, the petitioner, at arraignment without counsel being appointed, pled not guilty. The Supreme Court held that the arraignment is a critical stage in a criminal proceeding, and the failure to appoint counsel to represent the defendant at that time is a denial of due process. The court stated at page 55:

> When one pleads to a capital charge without benefit of counsel, we do not stop to determine whether prejudice resulted. (Citing cases.) In this case . . . the degree of prejudice can never be known. Only the presence of counsel could have enabled this accused to know all the defenses available to him and to plead intelligently.

The respondent and the Missouri Supreme Court opinion state that no infringement of rights occurred for two reasons. The first is that "There is neither claim nor proof that anything done or said at any preliminary hearing or in any medical or mental examination was employed against [Stidham] or that the state even secured any relevant information." (448 S.W. 2d at 639.) More decisive, according to the court, is the fact that Stidham was not prosecuted by information (under which the preliminary hearings had been held) but rather by an indictment re-

turned on November 23, 1954. "Thus there was no occasion or place for a preliminary hearing." Petitioner, along with his six co-defendants, were arraigned under the information on September 29, 1954; the information was dismissed and the indictment was returned on November 23, 1954. On this date counsel was appointed, and petitioner was rearraigned with the presence of counsel on December 6, 1954.

The important question is whether the arraignment and preliminary hearing are critical stages in the proceedings in Missouri. Under Missouri law, a defendant is not required to assert any right, plea or defense at the arraignment in order to preserve any statutory or constitutional rights. (V.A.M.S., § 546.020) Moreover, all rights, pleas or defenses are preserved inviolate. In *State* v. *Benson*, (Mo. Sup.) 415 S.W. 2d 773, it was held that the absence of counsel during arraignment is not, per se, a violation of the Sixth Amendment. In *Madison* v. *Tahash*, (C.A. 8) 359 F. 2d 60, the court held that the arraignment was not a critical stage of the criminal proceedings in Minnesota. *Donnell* v. *Swenson*, (W.D. Mo.) 302 F. Supp. 1024, extended the *Tahash* holding to cover arraignments in Missouri.

In *State* v. *Patrick*, (Mo. Sup.) 420 S.W. 2d 258, the preliminary hearing was held not to be a critical stage. This view is also supported by *Pope* v. *Swenson*, (C.A. 8) 395 F.2d 320, 322, in which the court stated, "We agree that denial of counsel at the preliminary hearing under Missouri law was not a constitutional infirmity in Pope's conviction, where the defendant pleaded not guilty and was otherwise not shown to have been prejudiced." See also *Nolan* v. *Nash*, (C.A. 8) 316 F. 2d 777; Cf. *Burnside* v. *State of Nebraska*, (C.A. 8) 346 F. 2d 88; *Holland* v. *State of Nebraska*, (C.A. 8) 416 F. 2d 1007.

Petitioner in this case did not plead, and, pursuant to V.A.M.S., § 546.020, a plea of not guilty was entered for him. At the second arraignment, petitioner pleaded not guilty, was furnished a copy of the indictment and, upon his request for a certain lawyer, the court appointed that attorney who represented him thereafter. Petitioner raises no complaints about the efforts of the attorney in his behalf. Petitioner has not shown that he was deprived of any rights by the failure to appoint counsel at the first arraignment, and, therefore, in line with the Eighth Circuit Court of Appeals, we hold that the failure to appoint counsel at that time was not a deprivation of rights.

Petitioner further asserts that the state knowingly used perjured testimony of two witnesses against him. The state used two prison inmates, Herman Trout and James Creighton, to testify; as proof of perjury, petitioner states that both prisoners had their sentences commuted and were released from prison on the same day.

In making such an allegation, the burden of proof is on petitioner to show both that the testimony was perjured and that such testimony was knowingly and intentionally used by the prosecuting attorney in order to obtain a conviction. *Anderson* v. *United States*, (C.A. 7) 403 F. 2d 451; *Smith* v. *State of Florida*, (C.A. 5) 410 F. 2d 1349, and cases cited therein; *Enzor* v. *United States*, (C.A. 5) 296 F. 2d 62; *United State* v. *Jenkins*, (C.A. 3) 281 F. 2d 193. The petitioner has not met this test. His allegations and the record are devoid of any proof of perjury or willful use of perjury by the state. Furthermore, petitioner concedes that he has no direct proof, but contends that the circumstantial evidence, that of commutation of sentence less than six months after Stidham's trial, is sufficient proof to indicate perjury in line with *Napue* v. *Illinois*, 360 U.S. 264. That case is not controlling here because there

was express proof of a "deal" between the prosecutor and witness in the case. Here there is no such proof.

Petitioner's three remaining contentions relate to the issue of voluntariness of his confession. He asserts that he was coerced by physical and mental punishment to confess, that the confession was admitted without a finding by the trial judge that it was voluntary, and that the instruction given at the trial did not fully set out the constitutional standards for the jury's guidance in determining the issue of voluntariness.

In regard to petitioner's first allegation, he relies mainly upon the cases of *Clewis* v. *Texas,* 386 U.S. 707, and *Davis* v. *North Carolina,* 384 U.S. 737. Both cases use the criterion of "totality of circumstances" in determining whether the confessions were voluntary. The respondent and the Missouri Supreme Court opinion lend little credence to Stidham's testimony because "Without narrating even briefly, the testimony in contradiction of Stidham's uncorroborated claims was all but overwhelming . . ." This not unexpected. The Supreme Court in both *Clewis* and *Davis, supra,* commented, "As is almost invariably so in cases involving confessions obtained through unobserved police interrogation, there is a conflict in the testimony as to the events surrounding the interrogation."

It is necessary to review the uncontroverted facts in order to determine this issue. The murder was committed on September 22, 1954 and Stidham confessed on September 27, 1954. He was questioned intermittently up until that time concerning his part in the murder. He had very little food and very little sleep. At no time during this period was he informed of his right to counsel or to remain silent. In fact, he asserts that an attempt to get an attorney was thwarted when the prison authorities refused to allow a letter to be mailed. On the 27th, Stidham was

taken to the Athletic Building and questioned by a number of officers who had hand guns and riot guns in their possession. Stidham asserts that he was physically abused and rendered unconscious at this time, and these acts resulted in his confession. Before and after the interrogations Stidham was in solitary confinement and no visitors, including parents or priest, were allowed to see him. Other uncontradicted facts indicated that Stidham was deprived of food for two days after his confession and that he lost 25 pounds during the period of interrogation.

He had consistently denied all involvement in the murder up until the time of his confession.

The most damaging of the factors considered in the totality of the circumstances is the failure to inform petitioner of his rights. *Miranda* v. *Arizona*, 384 U.S. 436, has been determined not to be applicable retroactively. (See *Johnson* v. *New Jersey*, 384 U.S. 719.) However, it still remains that the failure to inform is a significant factor in determining the issue of voluntariness, although it is insufficient in itself to require the voiding of the confession. Wholly apart from the disputed facts, the statement of facts established by the record and as found at Stidham's 27.26 evidentiary hearing do not lead to the conclusion that such pressures were applied to Stidham as to result in overcoming his will to maintain his innocence.

Petitioner next attacks the procedure used by the trial court in determining the voluntariness of the confession, alleging that it is in violation of *Jackson* v. *Denno*, 378 U.S. 368. In that case, a constitutional rule was established that a jury was not to hear a confession unless and until the trial judge had determined that it was freely and voluntarily given. In *Sims* v. *Georgia*, 385 U.S. 538, the court further extended this holding at page 544:

> The rule allows the jury, if it so chooses, to give absolutely no weight to the confession in determining the guilt or innocence of a defendant but it is not for the jury to make the primary determination of voluntariness. Although the judge need not make formal findings of fact or write an opinion, his conclusion that the confession is voluntary must appear from the record with unmistakable clarity.

Here, in accordance with a request of Stidham's counsel, the trial court conducted a preliminary examination inquiring into the voluntariness of the confession outside of the hearing of the jury. Witnesses were called and cross-examined. This hearing satisifed the requirement of *Jackson* v. *Denno, supra,* that there be a (1) reliable nonjury preliminary or post conviction determination of the issue of voluntariness, (2) uninfluenced by the truth or falsity of the confession (3) by procedures "fully adequate to insure a reliable and clear-cut determination, including the resolution of disputed facts upon which the voluntariness issue may depend."

At the conclusion of the testimony, the court made the following statement:

> THE COURT: Now, at the conclusion of the hearing held outside of the hearing of the Jury, the request by the Defendant for a hearing upon the statement which has been identified as—
>
> MR. RILEY: 16 and 16-1.
>
> THE COURT: 16 and 16-1, it is the Court's opinion that the matters concerning the statement should be offered in the presence of the Jury, subject of course to any attacks as to its credibility by the Defendant. The Defendant has of course the right to proceed to challenge the voluntariness of the statement and confession, even before the Jury, but it is the Court's opinion that upon the evidence that has been offered before the Court and outside of the hearing of the

Jury, that the statement is and should be admissible in evidence, subject to further examinations of the witnesses which might be conducted, so we may proceed with Sergeant Little, as to his identification before the Jury of the statement in question, Exhibit 16 and 16-1.

MR. HENNELLY: In other words, the Court is overruling my Motion, and request of the Court to hold as a matter of law, that those statements were involuntary, is that right?

THE COURT: That is right. Mr. Sheriff will you bring the Jury back in?

If the trial court had simply stated that he found the confession was voluntarily made after hearing the many witnesses who testified on this score, the matter would have been settled and this point could not be raised in this Court. There are many cases holding that a ruling by the Court that the evidence heard "makes a jury issue of the matter," or words of similar import, do not satisfy the rule of *Jackson* v. *Denno, supra.* And so the precise question presented here is whether the Court did find the confession involuntary or whether he failed to rule on that point and decided to let that question be decided by the jury.

The evidence in this case on behalf of the defendant, which the judge heard, was that he was subjected to brutal physical torture to induce the confession. If the judge had believed even a part of his testimony, he would have undoubtedly held the confession involuntary. The trial court held a full-scale evidentiary hearing on the voluntariness of the confession, and without actually using the word voluntary, directly held that he believed the state's witnesses and did not believe the defendant's testimony. This reasoning was supported by the direct ruling that he was denying the request of defendant's counsel to hold that the contested statement was involuntary.

It would be highly technical, in this day and age, to hold that the word "voluntary" was a word of art and, in its absence, a conviction by a jury, after a long trial, should be set aside because the judge ruled the statement was not involuntary instead of ruling that the statement was voluntary. It is the opinion of this Court that the statements and action of the judge does clearly indicate a finding of voluntariness, and is sufficient under the teachings of *Jackson* v. *Denno, supra,* and *Sims* v. *Georgia, supra.*

The petitioner's third attack is related to the second. Basically, he contends that since the judge made no specific finding of voluntariness, his instruction which did not require them to make a specific finding on the voluntariness of the confession was violative of *Jackson* v. *Denno, supra.* Since we have held that the trial court reliably determined the issue of voluntariness, it was not necessary for the jury to make a specific finding thereon.

Therefore, it is

ORDERED that the petition for habeas corpus be, and hereby is, denied.

/s/ Wm. R. Collinson
District Judge

APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 20,685

James William Stidham,
Appellant,
v.
Harold R. Swenson, Warden,
Appellee.

Appeal from the Judgment of the United States District Court for the Western District of Missouri Denying Appellant's Petition for the Writ of Habeas Corpus.

[May 24, 1971.]

Before GIBSON, HEANEY and BRIGHT, Circuit Judges.

HEANEY, Circuit Judge.

On September 22, 1954, an inmate of the Missouri State Penitentiary was beaten and stabbed to death by fellow inmates during a riot in that institution. An investigation was undertaken by the prison authorities immediately after the quelling of the riot. Written confessions were eventually obtained from several inmates, including James William Stidham. Stidham's confession was used against him in his 1955 trial in state court in which he was convicted of first degree murder.

Stidham made a number of attempts to obtain relief in Missouri courts on the ground that the trial judge did not find his confession to be voluntary, as required by *Jackson* v. *Denno*, 378 U.S. 368 (1964),[1] before submitting it to the jury. *State* v. *Stidham*, 305 S.W.2d 7 (1957); *State* v. *Stidham*, 415 S.W.2d 297 (1967); *State* v. *Stidham*, 449 S.W.2d 634 (1970). He was unsuccessful in each attempt.

On November 9, 1970, a habeas corpus petition brought by Stidham was denied by the United States District Court for the Western District of Missouri. The District Court found (1) that the trial court which initially tried Stidham had complied with *Jackson*, and (2) that on the basis of the undisputed facts adduced at the state trial and the subsequent state evidentiary hearing, the confession was voluntary. Stidham appeals from the denial.[2]

COMPLIANCE WITH JACKSON

At the initial trial, the state court heard evidence outside the presence of the jury on the voluntariness of the confession. At the conclusion of the hearing, the trial court stated:

> "* * * [I]t is the Court's opinion that the matters concerning the statement should be offered in the presence of the Jury, subject of course to any attacks as to its credibility by the Defendant. The Defendant

1. *Jackson* v. *Denno*, 378 U.S. 368 (1964), is retroactively applicable. *Desist* v. *United States*, 394 U.S. 244 (1969); *Parker* v. *Sigler*, 413 F.2d 459 (8th Cir. 1969), *rev'd on other grounds*, 396 U.S. 482 (1970).

2. Stidham also contends on appeal that he was denied assistance of counsel at two critical stages of his trial, that he was tried and convicted on a charge not included in his indictment and that the State of Missouri knowingly used the perjured testimony of two convicts in obtaining his conviction. We affirm the decision of the District Court on each of these issues for the reasons given in that court's memorandum opinion. *Stidham* v. *Swenson*, Civ. No. 18121-2 (W.D. Mo. May 15, 1970).

> has of course the right to proceed to challenge the voluntariness of the statement and confession, even before the Jury, but it is the Court's opinion that upon the evidence that has been offered before the Court and outside of the hearing of the Jury, that the statement is and should be admissible in evidence, subject to further examinations of the witnesses which might be conducted * * *
>
> "MR. HENNELLY [Defendant's counsel]: In other words, the Court is overruling my Motion, and request of the Court to hold as a matter of law, that those statements were involuntary, is that right?
> "THE COURT: That is right. * * *"

The United States District Court found that this ruling comported with the requirements of *Jackson* v. *Denno*, *supra*, stating:

> "It would be highly technical, in this day and age, to hold that the word 'voluntary' was a word of art and, in its absence, a conviction by a jury, after a long trial, should be set aside because the judge ruled the statement not involuntary instead of ruling that the statement was voluntary. It is the opinion of this Court that the statements and action of the judge does clearly indicate a finding of voluntariness, and is sufficient under the teachings of Jackson v. Denno, supra, and Sims v. Georgia, [385 U.S. 538 (19....)]."

We believe that the District Court's analysis is incorrect. It assumes that Missouri law, at the time of Stidham's trial, required the trial court to find that a confession was voluntary before permitting it to be considered by a jury. Our examination of the Missouri case law convinces us that a trial court had and frequently used the right to submit the question of voluntariness to the jury without a prior determination that the confession was voluntary.

The following statements of the Pre-*Jackson-Denno* Missouri procedure support this view:

"* * * [W]hen there is substantial conflicting evidence and the question is close it is better to refer the underlying issue of voluntariness to the jury than to exclude the confession, since there is less chance of a miscarriage of justice by leaving the question open to a second determination, before the jury on a rehearing of the evidence under proper instructions, than by foreclosing the inquiry. The court then can still exclude the confession if it finds from all the evidence, including that introduced at the preliminary hearing, that the same was involuntary. * * *"

State v. *Gibilterra*, 116 S.W.2d 88, 94 (1938).

"It is my view that we should adhere to the standard of admissibility of confessions of whether or not the particular confession is voluntary in fact. That has always been the rule of this Court. * * * [T]his is a jury question unless its involuntary character so conclusively appears that it must be held to be involuntary as a matter of law. * * * If the confession is voluntary in fact, and is true, the defendant's rights are not violated by putting it in evidence. Some one must determine these fact issues, and our system is to leave them to the jury, when they must be decided on conflicting evidence." (Citations omitted.)

State v. *Sanford*, 193 S.W.2d 37, 38 (1946) (concurring opinion).

"* * * Under our system of jurisprudence it is generally left to the jury to determine whether a confession was voluntary, unless the contrary appears so conclusively that the confession must be held involuntary as a matter of law. * * *" (Citations omitted.)

State v. *Laster*, 293 S.W.2d 300, 304 (1956).[3]

3. See also, *State* v. *Bridges*, 349 S.W.2d 214 (1961); *State* v. *Barnett*, 338 S.W.2d 853 (1960); *State* v. *Falbo*, 333 S.W.2d 279 (1960); *State* v. *Statler*, 331 S.W.2d 526 (1960); *State* v. *Phillips*, 324 S.W.2d 693 (1959); *State* v. *Bradford*, 262 S.W.2d 584 (1953); *State* v. *Cochran*, 203 S.W.2d 707 (1947); *State* v. *Ellis*, 193 S.W.2d 37 (1946).

Our analysis of the record of Stidham's trial leads us to conclude that the trial judge in this case submitted the voluntariness issue to the jury without making a prior factual determination that the confession was voluntary. His finding, that the confession was not "involuntary as a matter of law", was not, under the then existing Missouri law, the same as finding that it was voluntary. If the trial judge does not make a *factual* determination that a confession is voluntary before submitting it to the jury, *Jackson* standards are violated. *Parker* v. *Sigler*, 413 F.2d 459 (1969), *rev'd on other grounds*, 396 U.S. 482 (1970).

The Missouri Supreme Court's treatment of this issue on Stidham's appeals buttresses our view that the requirements of *Jackson* were not met. In its first *Stidham* opinion, 305 S.W.2d 7 (1957), the court stated:

> "There is no merit in defendant's contention that his written confession was coerced and involuntary and was admitted in evidence before the State established that it had been voluntarily given. The court conducted a full preliminary hearing on the issue, *found the issue was for the jury, and later, after hearing the evidence before the jury submitted the issue to the jury for determination.* * * * On the conflicting showing the issue of the voluntariness of the confession was for the jury. * * *" (Emphasis added.)

In its most recent *Stidham* opinion, 449 S.W.2d 634 (1970), the Missouri Supreme Court examined its procedure and determined that "* * * Missouri employs the so-called Massachusetts procedure 'impliedly approved in *Jackson* v. *Denno*' * * *". In doing so, the court relied upon *State* v. *Washington*, 399 S.W.2d 109 (1966). We point out that *State* v. *Washington* was decided after *Jackson* became the law, and a comparison of its standard with those enunciated in the Missouri cases, above cited, reveals the difference between the 1955 and 1966 standards.

THE VOLUNTARINESS OF THE CONFESSION

The Supreme Court recently reemphasized that a defective procedure, standing alone, is not a sufficient basis for habeas corpus relief:

> "[Our decisions][4] did not establish that an applicant for federal habeas corpus is entitled to a new hearing on the voluntariness issue, in either the federal or state courts, merely because he can point to shortcomings in the procedures used to decide the issue of voluntariness in the state courts. Our decisions make clear that he must also show that his version of events, if true, would require the conclusion that his confession was involuntary."

Procunier v. *Atchley*, . . . U.S. . . ., 27 L.Ed.2d 524, 529 (1971).

Stidham alleges: that he was returned to his regular Death Row cell in the early evening of September 22; that between September 22 and September 27, he was questioned intermittently by police officers and state troopers who threatened him with physical harm if he did not tell everything he knew about the murder; that between September 22 and September 27, he was able only to catch short naps while sitting on the toilet because his straw tick, on the floor, was too water-logged to be slept on as a result of his cell being flooded when rioting inmates opened water pipes; that he was given nothing to eat from September 22 until September 29; that he weighed 184 pounds before the riot but only 159 pounds on September 29; that he was never informed of his *Miranda* rights;[5] that on September 27, he was taken to the prison's

4. The Court was specifically referring to *Jackson* v. *Denno*, *supra*, and *Townsend* v. *Sain*, 372 U.S. 293 (1963).

5. Since the *Miranda* decision is not retroactive, *Johnson* v. *New Jersey*, 384 U.S. 719 (1966), this allegation, even if true, is not dispositive of the case. However, failure to warn of constitutional rights is a factor properly considered in determining the voluntariness issue. *Clewis* v. *Texas*, 386 U.S. 707 (1967); *Davis* v. *North Carolina*, 384 U.S. 737 (1966).

athletic field house and questioned in the presence of six police officers armed with pistols, rifles and riot guns; that he was questioned for approximately twenty to thirty minutes, during which time he denied involvement in the murder; that, thereafter, a rope was placed through his handcuffs and he was hung up for approximately fifteen minutes with his hands behind him; that upon his continued refusal to implicate himself, he was again hung up and beaten with corkball or baseball bats until he lost consciousness; and that he then wrote out a confession which was dictated to him.

We believe that the above version of the facts, if true, requires the conclusion that the confession was an involuntary one. See, *Brooks* v. *Florida*, 389 U.S. 413 (1967); *Watts* v. *Indiana*, 338 U.S. 49 (1949); *Brown* v. *Mississippi*, 297 U.S. 278 (1936).

We emphasize that we do not decide or intimate that the allegations are true. It is not the task of the federal court to do so in state habeas corpus matters:

> "* * * [T]he appropriate remedy when a federal court finds a Jackson v. Denno error in a prior state proceeding is to allow the State a reasonable time to make an error-free determination on the voluntariness of the confession at issue. * * *"

Sigler v. *Parker*, *supra* at 484.

We only note, as did the United States District Court, that we have examined the transcripts and other relevant materials and have found that several of Stidham's allegations have not been contradicted in the record.

The judgment of the District Court is reversed and the case is remanded to that court for further proceedings consistent with the remedy provided for in *Sigler* v. *Parker*, *supra*.

GIBSON, Circuit Judge, dissenting.

I respectfully dissent. Appellant Stidham has been accorded many hearings and with the aid of extremely able and expert counsel has raised just about every objection and defense available in the well stocked arsenal of defense tactics—this he has a right to do, but I do not think the never-ending search for error, fancied or otherwise, serves the cause of criminal justice. The Courts rather than spending limited judicial resources in open end legal proceedings should give heed to the many evils engendered in the law's delay and give adherence to the constitutional mandate for speedy trials. Only by unclogging the dockets can this be done. Much has been said and written about the inordinate delays, both at the trial and appellate levels, that have burdened and made ineffective to a large extent our system of criminal justice.

I would affirm on the basis that the Missouri Supreme Court has correctly enunciated the Missouri law applied in this case at the original trial and that Court's holding that the procedure in this case was compatible with *Jackson* v. *Denno*. *State* v. *Stidham*, 449 S.W.2d 634 (Mo. 1970). A State Supreme Court is the best interpreter of its own laws. In addition, a review of the entire record of the original conviction, the record in the plenary hearing in the state post-conviction review, together with the federal post-conviction review in the federal District Court does not affirmatively demonstrate any ground for upsetting the jury verdict of 1954.

First as to the law, the preliminary inquiry into the voluntariness of the confession during the original trial of this case held by the trial judge out of the presence of the jury, I think, adequately satisfied the requirements of *Jackson* v. *Denno*, 378 U.S. 368 (1963). The failure of the trial judge to use the word "voluntary" instead of "not

involuntary" is a matter of semantics and too technical a basis upon which to upset a conviction affirmed by the highest state court. The jury is the ultimate trier of fact on the voluntariness issue if the confession is not involuntary as a matter of law. *Jackson* v. *Denno,* required a preliminary examination outside of the hearing of the jury on the issue of voluntariness. This was done.

The trial judge at the plenary preliminary hearing could only do one of two things; hold the confession involuntary as a matter of law and thus not admit it, or view it as not involuntary as a matter of law and admit it in evidence together with any evidence on the voluntariness issue that the accused wished to present. After all, the jury is the sole and only arbiter of the facts and only has to give the confession such weight as it deems merited. The trial judge could not say the confession is voluntary and instruct the jury that it must accept the confession and act accordingly.[1] The judge here made the only finding he could legally make to have the confession admitted into evidence for the jury's consideration; that is, it was admissible on the ground that it was not involuntary as a matter of law. This was a far cry from the limited and incomplete procedure condemned in *Jackson* v. *Denno.*

The argument here appears to be more a matter of semantics or technicalities than a substantial procedural defect in trial proceedings. The trial court's decision in admitting the confession was based on conflicting evidence, the same evidence that is now urged to upset the verdict and judgment of the state court. No new evidence has been adduced and we are in effect now being asked to

1. The trial judge could not tell the jury the confession was voluntary; that would constitute error in a Missouri state trial, be considered a fatal comment on the evidence and as invading the province of the jury.

review this same evidence and hold the procedure bad because the judge did not use the magic rubric "voluntary" but said in effect, as is clearly shown by the record, that the confession was admissible and not involuntary as a matter of law.[2] By refusing to hold that the confession and statements were involuntary, the Court in the context of this hearing would be holding that the confession and statements were voluntary. This particular preliminary hearing on the confession and statements was not held just to see if there was conflicting evidence, as under the New York rule held defective in *Jackson* v. *Denno*.

Second as to the facts, I agree with the majority that *Procunier* v. *Atchley*, . . . U.S. . . ., 27 L.Ed.2d 524 ( ), is not applicable to this case as the appellant would clearly be entitled to have the confession ruled inadmissible if his version of the facts is correct and, in addition, his conviction would be a travesty on justice if his version of the facts in the case is correct. The conflict of the evidence in this case carries throughout the confession and the other evidence adduced at the trial. The decision on the admissibility of the confession is solely predicated on credibility factors. The only evidence of a forced or involuntary confession comes from the mouth of the accused. All of the other evidence, including that of

2. At the conclusion of the preliminary hearing on the issue of the admissibility of the confession (and it would not be admissible if involuntary), the trial judge said,

> "It is the Court's opinion that the matters concerning the statement should be offered in the presence of the Jury, * * * The defendant has of course the right to proceed to challenge the voluntariness of the statement and confession, even before the Jury, but it is the Court's opinion that upon the evidence * * * that the statement is and should be admissible in evidence, subject to further examinations of the witnesses * * *."

And in response to appellant's counsel's question of whether he was overruling the motion and request "to hold as a matter of law that those statements were involuntary", replied "That is right."

four St. Louis, Missouri, policemen and two State Highway Patrolmen are in direct conflict with the testimony of the accused in regard to the confession. Further, testimony of the accused regarding his non-participation in the killing of Donnell is rather persuasively refuted by prison guard Dietzel and inmates Creighton and Trout, all of whose statements are consistent with the State's version of the group assault and killing of inmate Donnell.

In other words for Stidham to be innocent as claimed all of the other testimony in the case, except as to formal matters and some neutral medical testimony from the Springfield Medical Center, would have to be out and out perjury. As noted by the Missouri Supreme Court in Stidham's original appeal, *State* v. *Stidham*, 365 S.W.2d 7 (1957), the accused Stidham while taking the stand failed to controvert essential elements of the State's case and failed to adduce any corroboration for his version of the facts.[3]

The trial lasted several days and the jury after being out 1½ hours rendered a unanimous verdict of guilty. Certainly no material error affecting the integrity of the fact-finding process has been disclosed.

---

3. A reading of the record of the original trial shows the rioters made a particular effort to break through three doors to get into Death Row where Stidham was being held in solitary confinement (for infraction of prison rules—escape) for the particular purpose of releasing Stidham and then presenting him to the group as their leader. Stidham's version that he left the Death Row area immediately and went upstairs to another cell and listened on the radio while drinking coffee during all of the period of the tumultuous riot does not appear credible. Also no corroboration has been produced by Stidham either at the time of trial or since. While on the other hand three witnesses, guard Dietzel and inmates Creighton and Trout, directly controverted Stidham's version of his actions at that time and place Stidham at the scene of the crime with the other six defendants who were accused of this brutal and sadistic killing. Without detailing all of the evidence, the evidence presented aside from the confession was persuasive.

I would affirm Judge Collinson and his view that the action of the original trial judge "clearly indicates a finding of voluntariness and is sufficient under the teachings of *Jackson* v. *Denno, supra,* and *Sims* v. *Georgia, supra.*" Furthermore issues of credibility and issues of fact decided long ago should not be upset by technicalities or semantics. There appears to be no constitutional defect in the fact-finding process utilized in this case and the issue of credibility after full hearing was decided adversely to Stidham both in the original trial and at a plenary State post-conviction hearing, *affirmed* in 449 S.W.2d 684 (Mo. 1970). I would affirm the District Court's denial of relief.

A true copy.

Attest:

Clerk, U. S. Court of Appeals, Eighth Circuit.

APPENDIX F

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

September Term, 1970

James William Stidham,
Appellant,
vs.
Harold R. Swenson,
Appellee.
No. 20685

Appeal from the United States District Court for the Western District of Missouri.

This appeal comes before the Court on consideration of appellee's petition for rehearing or transfer to the Court en banc. Being fully advised in the premises, it is now here ordered:

1. Petition for rehearing en banc is denied by an equally divided Court;

2. Petition for rehearing by the panel to which the case was previously submitted is denied.

June 11, 1971

APPENDIX G

IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

JAMES WILLIAM STIDHAM,
Petitioner,
vs.
HAROLD R. SWENSON,
Respondent.

Civil Action
No. 18711-2

Order Granting Leave to Proceed in Forma Pauperis and Denying Petition for Habeas Corpus

(Filed November 5, 1970)

On February 18, 1970, Stidham filed a petition for habeas corpus which was denied by this Court by order entered on May 15, 1970. *Stidham* v. *Swenson*, Civil Action No. 18121-2. Stidham filed a notice of appeal and a request for certificate of probable cause which was granted, along with leave to appeal in forma pauperis. On June 25, 1970, the Eighth Circuit Court of Appeals granted Stidham's motion to dismiss the appeal. At that time the Clerk of the Court informed Stidham that if he intended to renew his claims, he had to proceed anew in the district court.

On September 25, Stidham filed another petition for habeas corpus in this Court in which he by reference to his prior petition stated identical grounds for relief. Shortly before or at the same time he filed a motion to reinstate the appeal in the Court of Appeals, despite the instructions given to him when his appeal was dismissed. The Court of Appeals denied his motion.

The pertinent facts are set out in the order denying the petition for habeas corpus in Civil Action No. 18121-2

and need not be restated here. In that petition, Stidham stated seven grounds for relief, which were: (1) that he was tried and convicted upon a charge of conspiracy which was not included in the indictment; (2) that he was deprived of assistance of counsel at two critical stages of the proceedings against him; (3) that he did not knowingly or competently waive the assistance of counsel at any stage of the proceedings; (4) that certain members of the Missouri State Highway Patrol and personnel of the Missouri State Penitentiary exerted physical and mental punishment upon him to secure a confession from him; (5) that the trial judge admitted the confession into evidence without first making a clear and specific finding that the said confession was voluntary; (6) that Instruction No. 6 given at the trial did not fully set out the constitutional standards for the jury's guidance to determine the voluntariness of the said confession; and (7) that the state knowingly used perjured testimony of two convicts to obtain the conviction of petitioner.

By amendment to this petition herein, Stidham states an additional ground for relief, alleging that he was denied the right to confront and cross-examine a state's witness whose testimony as to certain implicating statements was objected to, the objection sustained, but the jury not instructed to disregard.

In regard to Stidham's seven allegations which are raised here for the second time and upon which this Court denied relief in the prior petition (18121-2), it is unnecessary to restate our findings, and we readopt them here. However, one point—that he was denied counsel at arraignment and preliminary hearing—does merit further consideration.

Factually, there were two arraignments. The first was instituted by the prosecuting attorney on an informa-

tion in the magistrate court. Although Stidham demanded counsel at that time, none was appointed. A plea of not guilty was entered for him. (V.A.M.S., § 546.020) Preliminary hearings were held as required by V.A.M.S., § 544.250. The information was later dismissed, and Stidham was arraigned again on an indictment returned by the Grand Jury of Cole County. At that time counsel (whom he had requested) was appointed for him. In the prior civil action (18121-2), we held that Stidham was not entitled to relief because the arraignment and preliminary hearing have been held not to be critical stages in Missouri. *State* v. *Benson,* (Mo. Sup.) 415 S.W. 2d 773; *State* v. *Patrick,* (Mo. Sup.) 420 S.W. 2d 258; *Madison* v. *Tahash,* (C.A. 8) 359 F. 2d 60; *Donnell* v. *Swenson,* (W.D. Mo.) 302 F. Supp. 1024; *Pope* v. *Swenson,* (C.A. 8) 395 F. 2d 320; *Nolan* v. *Nash,* (C.A. 8) 316 F. 2d 777.

Subsequent to our opinion in the prior habeas corpus action, the Supreme Court handed down *Coleman* v. *Alabama,* 399 U.S. 1, in which it was held that a preliminary hearing is a critical stage of a criminal proceeding, that counsel was essential to protect the accused against any erroneous or improper prosecution, and that the right of counsel under the Sixth Amendment is applicable to such proceedings.

Coleman was decided on June 22, 1970. The arraignment and preliminary hearing in question here occurred in 1955. Assuming, but not deciding, that *Coleman* would apply to the fact situation here, it must be determined whether or not *Coleman* is to be applied retroactively. Although the Supreme Court has not rendered a decision on this point, the Eighth Circuit Court of Appeals has expressly held that *Coleman* is not retroactive. *Konvalin* v. *Sigler,* (C.A. 8) No. 19731 (decided September 22, 1970, not yet reported). Therefore, in line with our controlling

court, we hold that *Coleman* does not apply retroactively to this situation.

Stidham's latest contentions are that he was denied the right to confront and cross-examine one Officer Eitzman who "testified before the jury and judge that he took statements implicating petitioner in the murder he was on trial for;" and that the testimony of Eitzman in regard to these implicating statements was objected to, the objection sustained, but the jury was not instructed to disregard it.

Stidham claims that he exhausted his state remedies in regard to these contentions because the Missouri Supreme Court decided them adversely to him on his direct appeal. *State* v. *Stidham,* 305 S.W. 2d 7. However, a review of that case shows that Stidham did not raise the issue that he was denied the right to confront and cross-examine Officer Eitzman in regard to alleged implicating statements. Nor was the issue raised in any of Stidham's appeals to the Missouri Supreme Court from denials of his 27.26 motions. See *State* v. *Stidham,* (Mo. Sup.) 403 S.W. 2d 616; 415 S.W. 2d 297; 449 S.W. 2d 634. Since Stidham does have presently-existing and adequate state remedies to raise this contention, the contention must be dismissed without prejudice. See 28 U.S.C. § 2254; *Fay* v. *Noia,* 372 U.S. 391.

In his direct appeal from his conviction, Stidham did allege that the trial court should have instructed the jury to disregard the testimony of Eitzman in regard to implicating statements, after sustaining an objection to it. The Missouri Supreme Court found the issue in favor of the state.

The objected-to testimony of Eitzman was as follows: "I had talked to him and explained to him that I had a statement—" (Tr. 508). The trial court sustained the ob-

jection to what Eitzman told Stidham; ruled that the witness was not to testify or be asked what statements he made, or what statements he had from other parties; and determined that the jury did not need to be instructed to disregard because nothing damaging had been said when the defense halted the testimony by its objection. (Tr. 508-511)

There does not appear to be a denial of a federally-protected right by the trial court's determination not to instruct the jury to disregard Eitzman's incomplete remark. Therefore, no relief can be granted by this Court.

For the foregoing reasons, it is

ORDERED that leave to proceed in forma pauperis be, and it is hereby, granted; and

ORDERED that the petition for habeas corpus be, and it hereby is, denied.

/s/ Wm R. Collinson
District Judge

APPENDIX H

Judgment

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

September Term, 1969

James William Stidham,
Appellant,
vs.
Harold R. Swenson, Warden, Missouri State Penitentiary.
No. 20337

Appeal from the United States District Court for the Western District of Missouri.

Motion of appellant to dismiss the appeal from the United States District Court for the Western District of Missouri in this cause having been filed, and in pursuance of said motion,

It is now here ordered and adjudged by this Court that the appeal from the said District Court in this cause be, and the same is hereby, dismissed without prejudice.

And it is further ordered that the mandate in this cause issue forthwith to the said District Court.

June 24, 1970

APPENDIX I

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

September Term, 1969

James William Stidham,
Appellant,
vs.
Harold R. Swenson, Warden, Missouri State Penitentiary.

No. 20337

Appeal from the United States District Court for the Western District of Missouri.

Judgment of this Court dismissing the appeal in this cause from the United States District Court for the Western District of Missouri was entered June 24, 1970. Our mandate issued to the aforesaid District Court on that date. The case now comes before the Court on consideration of appellant's motion to reinstate the appeal on our docket. Being fully advised in the premises, it is now here ordered that the motion be, and it is hereby, denied.

October 14, 1970